

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
. .
W.R. GRACE & CO., . USX Tower - 54th Floor
et al., . 600 Grant Street
. Pittsburgh, PA 15219
Debtors. .
. September 14, 2009
. 8:42 a.m.

TRANSCRIPT OF PLAN CONFIRMATION HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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I N D E X

| <u>WITNESSES:</u> | <u>PAGE</u> | | |
|-------------------------------------------------|-------------|-------------|-------------|
| ELIHU INSELCUCH | | | |
| Direct Examination by Mr. Lockwood | 31 | | |
| Cross Examination by Mr. Giannotto | 46 | | |
| Cross Examination by Mr. Cassada | 78 | | |
| Cross Examination by Mr. Monaco | 107 | | |
| Cross Examination by Ms. Casey | 112 | | |
| Cross Examination by Mr. Davis | 132 | | |
| Cross Examination by Mr. Speights | 139 | | |
| Redirect Examination by Mr. Lockwood | 164 | | |
| Recross Examination by Mr. Giannotto | 167 | | |
| RICHARD C. FINKE | | | |
| Direct Examination by Ms. Esayian | 169 | | |
| Cross Examination by Mr. Plevin | 185 | | |
| Cross Examination by Mr. Brown | 186 | | |
| Cross Examination by Mr. Cohn | 229 | | |
| Redirect Examination by Ms. Esayian | 235 | | |
| JAY HUGHES | | | |
| Direct Examination by Mr. Bernick | 237 | | |
| Direct Examination by Mr. Finch | 268 | | |
| Cross Examination by Mr. Lewis | 281 | | |
| Cross Examination by Mr. Phillips | 290 | | |
| Cross Examination by Mr. Monaco | 295 | | |
| <u>EXHIBITS</u> | | | |
| | | <u>I.D.</u> | <u>EVD.</u> |
| CNA-13 Order/ <u>Armstrong World Industries</u> | -- | 55 | |
| CNA-26 annual report | 62 | 64 | |
| CNA-10 annual report | 64 | 65 | |
| PP-505-1, 505-2, 505-3 505-4 | -- | 183 | |
| PP-1 Settlement agreement | -- | 239 | |
| FCR-1 to 13 Documents | -- | 290 | |
| State of Montana 149 Proof of claim | -- | 304 | |

1 THE CLERK: Court come to order.

2 THE COURT: Please be seated. This is the
3 continuation of the Phase II confirmation hearing in the W.R.
4 Grace 01-1139. I have a list of participants by phone are
5 David Austern, Scott Baena, Janet Baer, Ari Berman, David
6 Bernick, David Blabey, Thomas Brandi, Peg Brickley, Elizabeth
7 Cabraser, Stefano Calogero, Christopher Candon, Matthew Cantor,
8 Richard Cobb, Tiffany Cobb, Jacob Cohn, Andrew Craig, Joshua
9 Cutler, Leslie Davis, Michael Davis, Elizabeth DeCristofaro,
10 Elizabeth Devine, Martin Dies, Melanie Dritz, Terrence Edwards,
11 Marion Fairey, Debra Felder, Theodore Freedman, Jeff Friedman,
12 Robert Gilbert, Christopher Greco, James Green, Robert
13 Guttmann, Matthew Harvey, Daniel Hogan, Robert Horkovich, Brian
14 Kasprzak, David Klauder, John Kozyak, Matthew Kramer, Michael
15 Lastowski, Elli Leibenstein, Richard Levy, Robert Craig
16 Martin, John Mattey, Garvan McDaniel, Tara Mondelli, Kerri
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19 Phillips, Curtis Plaza, Mark Plevin, Joseph Radecki, Natalie
20 Ramsey, Andrew Rosenberg, Ilan Rosenberg, David Rosendorf, Alan
21 Runyan, Jay Sakalo, Darrell Scott, Michael Shiner, Daniel
22 Speights, Shayne Spencer, Theodore Tacconelli, Edward
23 Westbrook, Clement Yee, Tacie Yoon, Rebecca Zubaty.

24 Folks, before we begin I'm having a problem. I don't
25 know if any of the parties are present. There was as a

1 stipulation of fact filed some time over the weekend or this
2 morning by Longacre and others. We cannot print it. For
3 whatever reason, it has jammed up our system, and it's 90-some
4 pages long. We simply cannot print it. I need a hard -- a
5 paper copy from whoever filed the stipulation, because I don't
6 know what it is. Do I need it for today? Good morning.

7 MR. CARIGNAN: Good morning, Your Honor. James
8 Carignan of Pepper Hamilton for Longacre. I walked in at the
9 tail end of that. I'm sorry. I do have several hard copies.
10 If I may approach?

11 THE COURT: Yes, please. Is it something I need for
12 today?

13 MR. CARIGNAN: Oh, well, I'd say that depends on
14 whether -- on the schedule if we're given an opportunity to
15 present our case today.

16 THE COURT: Okay. That's fine. Yes, I'll take a
17 copy, please, if you don't mind, because, otherwise, at the
18 moment I don't have any access to it. We can't read it, and we
19 can't print it.

20 MR. CARIGNAN: Certainly. Let me just grab it.

21 THE COURT: While he's doing that, can I get entries
22 of appearances for people who will be presenting information
23 today, please? Good morning.

24 MR. BERNICK: Good morning. David Bernick for Grace.

25 MR. LOCKWOOD: Peter Lockwood for the ACC, Your

1 Honor.

2 MR. FINCH: Nathan Finch for the ACC, Your Honor.

3 MR. GUY: Jonathan Guy and Roger Frankel for the
4 Asbestos PI FCR, Your Honor.

5 MR. MONACO: Frank Monaco from Womble Carlyle on
6 behalf of the State of Montana.

7 THE COURT: One second, please, folks.

8 (Pause)

9 MR. HURFORD: Mark Hurford for the ACC.

10 THE COURT: And I missed Mr. Monaco. Just a second.
11 Okay. I'm back. Thank you.

12 MR. PIERCE: Good morning, Your Honor. Steve Pierce
13 for Kaneb Pipe Line.

14 MR. GILBERT: Good morning. Robert Gilbert for
15 Kaneb.

16 MR. CASSADA: Good morning, Your Honor. I'm Garland
17 Cassada, Robinson, Bradshaw & Hinson. I'm here with Rich Worf
18 of our firm today. We represent Garlock Sealing Technologies,
19 a co-defendant in the tort system.

20 MR. COHN: Good morning, Your Honor. Jacob Cohn for
21 Cozen O'Connor for Federal Insurance Company.

22 MR. TURETSKY: Good morning, Your Honor. David
23 Turetsky of Skadden Arps with J. Gregory St. Clair also of
24 Skadden for Sealed Air Corporation.

25 THE COURT: Good morning.

1 MS. SIMON: Good morning, Your Honor. Marnie Simon
2 from Stevens & Lee for FFIC Alliance. John Demmy cannot be in
3 court today. He had a Third Circuit argument. And I filed a
4 pro hac vice motion on September 3rd. It has not yet been
5 granted.

6 THE COURT: All right. I haven't seen it, but I'll
7 have someone look for it for me. Thank you.

8 MS. SIMON: Thank you.

9 THE CLERK: Can I have your name, please?

10 MS. SIMON: Marnie, M-a-r-n-I-e, Simon, S-i-m-o-n,
11 Docket Number 23136.

12 THE COURT: Good morning.

13 MS. CASEY: Good morning, Your Honor. Linda Casey at
14 Pepper Hamilton on behalf of BNSF Railway Company. With me in
15 Court today is Jim Carignan, also at Pepper Hamilton, and
16 Robert Phillips of the Phillips Law Firm.

17 THE COURT: Thank you. Good morning.

18 MR. PERNICONE: Good morning, Your Honor. Carl
19 Pernicone and Tancred Schiavoni for Arrowwood.

20 MR. DAVIS: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. DAVIS: Michael Davis for National Union Fire
23 Insurance Company and the other Chartis companies.

24 MR. LEWIS: Good morning, Your Honor. Tom Lewis for
25 the Libby claimants.

1 THE COURT: Good morning.

2 MR. COHN: Good morning, Your Honor. Dan Cohn for
3 the Libby Claimants.

4 THE COURT: Good morning.

5 MR. SHINER: Good morning, Your Honor. Michael
6 Shiner and with me is Eileen McCabe, counsel for AXA Belgium,
7 as successor to Royal Belge.

8 THE COURT: Excuse me one second here.

9 (Pause)

10 THE COURT: Thank you. Good morning.

11 MS. KRIEGER: Good morning. Good morning, Your
12 Honor. Arlene Krieger from Stroock and Stroock and Lavan on
13 behalf of the Unsecured Creditors' Committee, and my colleague
14 Ken Pasquale will be here a little bit later.

15 THE COURT: All right. Thank you.

16 MS. ALCABES: Good morning, Your Honor. Elisa
17 Alcabes for Travelers Casualty and Surety Company.

18 MR. GLOSBAND: Good morning, Your Honor. Daniel
19 Glosband for Continental Casualty Company.

20 THE COURT: Good morning.

21 MR. HEBERLING: Good morning, Your Honor. Jon
22 Heberling for Libby claimants.

23 THE COURT: Good morning.

24 MR. LACEY: Good morning. And John Lacey, Libby
25 claimants.

1 THE COURT: Good morning.

2 MR. WISLER: Good morning, Your Honor. Jeffrey
3 Wisler on behalf of Maryland Casualty and Zurich.

4 MR. IFFT: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. IFFT: Richard Ifft on behalf of Maryland
7 Casualty and Zurich as well.

8 THE COURT: Good morning.

9 MR. LONGOSZ: Good morning, Your Honor. Edward
10 Longosz also on behalf of Maryland Casualty and Zurich.

11 MR. GIANNOTTO: Good morning, Your Honor. Michael
12 Giannotto on behalf --

13 THE COURT: Your microphone's not on, Mr. Giannotto.

14 MR. GIANNOTTO: Michael Giannotto on behalf of
15 Continental Casualty and the other CNA companies.

16 MS. DeCRISTOFARO: Good morning, Your Honor.

17 Elizabeth DeCristofaro for Continental Casualty and the other
18 CNA companies as well.

19 MR. PLEVIN: Good morning, Your Honor. Mark Plevin
20 and Leslie Davis for Fireman's Fund Insurance Company with
21 respect to its surety claim.

22 MR. BROWN: Good morning, Your Honor. Michael Brown
23 on behalf of One Beacon American Insurance Company --

24 THE CLERK: We can't hear you, Mr. Brown.

25 THE COURT: I don't think your microphone's on.

1 MR. BROWN: One Beacon American Insurance.

2 THE COURT: The microphone's not on.

3 MR. BROWN: On behalf of One Beacon --

4 THE COURT: The microphone's not on.

5 MR. BROWN: Michael Brown on behalf of --

6 THE COURT: It's -- can you press it just once? I

7 think it's being pressed -- is it bright green or dull green?

8 MR. BROWN: Michael Brown on behalf of One Beacon --

9 THE COURT: It's not on.

10 MR. BROWN: -- Insurance Company --

11 UNIDENTIFIED SPEAKER: Try that.

12 MR. BROWN: Michael Brown on behalf of One Beacon

13 American Insurance Company, Seaton Insurance Company, Geico,

14 and Republic Insurance Company. Thank you.

15 MR. PRATT: Warren Pratt --

16 THE COURT: That microphone's not on. Is it not

17 plugged in? Try it again. Press the button once.

18 MR. PRATT: Warren Pratt --

19 THE COURT: No. Try again. They may have

20 disconnected it to put in the -- okay -- to put in the Lavalier

21 mike in that side.

22 MR. GUY: We were hoping it would expedite things,

23 Your Honor.

24 THE COURT: Mr. Pratt, can you enter your appearance

25 for me? I don't think it's picked up on the record.

1 MR. PRATT: Warren Pratt, Your Honor, for One Beacon
2 American Insurance Company, Seaton Insurance Company, Geico,
3 and Republic Insurance Company.

4 THE COURT: Okay. Thank you. Jan, can --

5 MR. GUY: Your Honor, may I be --

6 THE COURT: -- can you send --

7 MR. GUY: -- may I quickly --

8 THE COURT: Can you send a note down to systems,
9 please, to come to check that microphone? If it's un -- if
10 they're planning to use the Lavalier side over there, which may
11 be the case, then -- it is the Lavalier?

12 THE CLERK: It's the Lavalier.

13 THE COURT: Okay. And you have one?

14 THE CLERK: I have two.

15 THE COURT: Okay. Fine. Thank you. Mr. Guy.

16 MR. GUY: Your Honor, on the Longacre stipulation, I
17 think we received that on Sunday. We also haven't had a chance
18 to review it. I believe it has a signature line for the
19 Asbestos PI FCR. We are not of a position to say now whether
20 we are on board or not, but I suspect we will be, but we just
21 need an opportunity to review it. So before the Court enters
22 the stipulation anyway, we would just like to take a -- some
23 time this morning to take a look at it.

24 THE COURT: Oh, I'm not going to entering a
25 stipulation until somebody at least proffers it to tell me what

1 it is, especially a 90-page one that I haven't read yet. But
2 okay.

3 MR. GUY: We have the same sentiment, Your Honor.

4 THE COURT: All right.

5 MR. GUY: Thank you.

6 THE COURT: Thank you. All right. Who's up?

7 MR. BERNICK: Your Honor, I'm sorry. We were
8 conferring to determine what the issue was. We have a couple
9 housekeeping matters. One, there are some plan modifications
10 that were made in response to concerns that were raised by BNSF
11 and Ms. Esayian will be distributing those to the parties and
12 to the Court. We want to make sure that happened before any
13 further evidence was taken. I guess it's really kind of later
14 on today.

15 The second is that we have a logistical problem that
16 we'd like to resolve. Todd Maynes is a partner of mine. He's
17 a tax partner. He's issued a declaration that says that the
18 Trust would constitute a qualified settlement fund. We're not
19 aware of any issue concerning the accuracy of that opinion.
20 The declaration's been distributed. There's nothing that's
21 been raised in any of the trial briefs or any of the papers
22 saying that it's wrong, and we don't want to have to bring in
23 Mr. Maynes.

24 There are hearsay objections that have been made.
25 Hearsay objections obviously would be resolved if he showed up.

1 Some of the declarations said yes, it's mine. So the issue is
2 whether we have to bring Todd Maynes here to show up and say
3 yes, it's mine and to permit cross examination, which cross
4 examination there's no indication will actually go to the
5 substance of the document.

6 So why is it that we have to bring him? Well,
7 apparently, Seaton, One Beacon has issues, because they want
8 slides relating to Mr. Shelnitz's testimony later on today,
9 which slides are in process. They're not done. They'll be
10 done this morning. I personally have been working on them.
11 And they want agreements as to certain documents. I hate to
12 raise this, but we have no other recourse. It is completely
13 improper to hold these different elements hostage to one
14 another. It impairs our process of trying to get
15 predictability in the witnesses who are going to testify at
16 trial, which is an extremely difficult logistical task. We're
17 trying to keep this trial moving.

18 THE COURT: Wait. I'm sorry. There's a hearsay
19 objection to Mr. Maynes' declaration, because somebody wants
20 documents on another witness?

21 MR. BERNICK: There's a hearsay objection to Mr.
22 Maynes' declaration, which then means that we have to bring him
23 to say yes, the declaration is mine.

24 THE COURT: Yes.

25 MR. BERNICK: And my understanding is that the

1 problem -- the reason we can't get the agreement not to call
2 him -- I know that this is true -- is that we haven't (a)
3 provided the slides to Mr. Shelnitz's testimony this afternoon
4 and (b) --

5 THE COURT: That have nothing to do with Mr. Maynes'
6 declaration.

7 MR. BERNICK: Nothing. Absolutely nothing --

8 THE COURT: All right.

9 MR. BERNICK: -- to do with it. And we need to get
10 this process continuing without these kinds of problems. I
11 raised it with counsel for Seaton, One Beacon this morning, who
12 wanted to talk with me about all kinds of other things but
13 didn't want to reach the agreement. And then in the words of
14 the gentleman to Mr. Brown's left -- right, I forget what his
15 name is, said, "Just bring him." Now, that's not the way we're
16 trying to do business here.

17 THE COURT: Gentlemen, is there an objection to what
18 Mr. Maynes has to say?

19 MR. BROWN: Your Honor, may I?

20 THE COURT: Yes.

21 MR. BROWN: Your Honor, we have been trying to work
22 out some relatively straightforward evidentiary issues.

23 THE COURT: Okay, but my question is, is there going
24 to be some dispute about the fact that the Trust will be a
25 qualified settlement fund? Because if not, I don't know what

1 the issue is, and we'll get to the other things later. But I
2 don't see the need to call -- to have the expense or the time
3 taken for a witness to come if there is no issue. If there is
4 an issue, fine. Tell me what the issue is.

5 MR. BROWN: Your Honor, I don't -- Mr. Maynes isn't
6 going to testify, if at all, until later this week, and the
7 problem -- the evidentiary issues we raised about Mr. Maynes'
8 declaration, he signs hearsay, which is what Mr. Bernick
9 referred to, is it is a legal opinion. From start to finish it
10 is a legal opinion. He wants to get up on the stand or he
11 wants to provide a declaration that's purely a legal opinion.
12 It's improper. It wasn't disclosed early, and we've lodged an
13 objection to it simply for the purpose of trying to get the
14 plan proponents to react to some very straightforward documents
15 that we're trying to get into the record.

16 THE COURT: I'm sorry. You don't hold one witness
17 hostage, because there are other issues. The issue is does
18 someone dispute that this Trust will be a qualified settlement
19 fund? If so, we'll have Mr. Maynes come. If not, I don't see
20 the need for this.

21 MR. BROWN: I don't -- Your Honor, I don't see the
22 need for Mr. Maynes to come either, but the fact of the matter
23 is, is that the testimony that he would present, whether it's
24 by declaration or in person is still a legal opinion.

25 MR. LOCKWOOD: Your Honor, he won't answer your

1 question.

2 THE COURT: You're --

3 MR. LOCKWOOD: There --

4 MR. BROWN: I will answer --

5 MR. LOCKWOOD: There is no issue. No party to this
6 case, including but not limited to Mr. Brown's clients, has
7 asserted that this Trust will not be a QSF. No party. We've
8 got a room full of people here. If somebody disagrees with
9 that, including Mr. Brown, they should say so, but he is not
10 answering your question.

11 MR. BROWN: I'm happy to answer that. Mr. Lockwood
12 is correct, Your Honor. We have not raised an objection to
13 that. We have raised an objection to the declaration, and, you
14 know, I thought one of the ways that you solved problems with
15 evidentiary issues, so they don't have to be taken up by the
16 Court, is you do a little bit of a horse trading, and that's
17 what we're doing.

18 THE COURT: Okay. I don't see horse trading over an
19 issue for this. I'm not going to require a tax partner from
20 Kirkland & Ellis to come here if there is no issue as to what
21 the gentleman would have to say. If there is no dispute by
22 anybody that the Trust will qualify as a qualified settlement
23 fund, then I don't even need the declaration. Why can't I get
24 a stipulation to that effect? That will solve your problem
25 with the declaration, and that will get us past the issue. So

1 is there anybody who objects to this Court finding as a fact
2 that the Trust will qualify as a qualified settlement fund?

3 (No verbal response)

4 THE COURT: Anyone on the phone? I understand you're
5 on mute. As a result, I -- but I want your microphones opened,
6 so that if someone has an objection, I can hear it. Does
7 anyone on the phone have an objection?

8 (No verbal response)

9 THE COURT: All right. There is no objection from
10 anyone. I will accept as a fact, without the need for witness
11 testimony, that the Trust will qualify as a qualified
12 settlement fund for Internal Revenue Service purposes.

13 MR. BROWN: Thank you, Your Honor.

14 THE COURT: Mr. Speights, you came in late. I want
15 to make sure that you don't have a problem with what I just
16 said.

17 (Laughter)

18 THE COURT: No one has to date raised an objection to
19 the fact that if this plan is confirmed and the Trust is set
20 up, that it will qualify as a qualified settlement fund for
21 Internal Revenue Service purposes, and I am prepared to accept
22 that as a fact without the need for any testimony. Do you have
23 any objection to my doing so?

24 MR. SPEIGHTS: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. SPEIGHTS: Dan Speights making a special
2 appearance for Anderson Memorial Hospital with respect to Mr.
3 Inselbuch's testimony, which Your Honor stated last Thursday
4 would be my only opportunity to examine Mr. Inselbuch, and
5 that's why I'm here. I'm not avoiding your question, by the
6 way, but I want to state that for the record.

7 THE COURT: All right.

8 MR. SPEIGHTS: You have now exceeded my pay grade,
9 however. I hope that Mr. Rosendorf might be on the phone,
10 although this is not our phase of the hearing, and that he
11 would address that. And if not, I will certainly check with
12 him. I have no reason to believe that we -- that we are going
13 to disagree with Your Honor's ruling on that point. I just --
14 I'm not a bankruptcy lawyer, and I'm certainly not a tax
15 lawyer.

16 THE COURT: All right. Mr. Rosen -- is Mr. Rosendorf
17 on the phone? If so, can you un-mute his microphone, please?
18 Mr. Rosendorf?

19 (No verbal response)

20 THE COURT: Do I have a Court Call operator?

21 OPERATOR: Yes, you do, Your Honor.

22 THE COURT: Is Mr. Rosen --

23 OPERATOR: He's not on the line.

24 THE COURT: Is Mr. Rosendorf on the line?

25 OPERATOR: No, Your Honor, he is not.

1 THE COURT: Okay, then I -- Mr. Speights, I will wait
2 until you have an opportunity to contact him later today to let
3 me know, because I don't see the need to bring a witness if
4 that fact is not going to be disagreed with by any entity.

5 MR. LOCKWOOD: Your Honor, just for the record, the
6 Anderson Memorial Hospital objection papers did not contain an
7 objection that the plan was -- the asbestos PI Trust --

8 THE COURT: I understand.

9 MR. LOCKWOOD: -- did not qualify as a QSF.

10 THE COURT: Yes, I understand that no one has raised
11 this issue, but before I release a witness, I want to make sure
12 that no one disagrees. That's all I'm doing. So I'm dotting
13 that I. End of story. So, Mr. Speights, if you could please
14 let me know.

15 MR. SPEIGHTS: I will be happy to, and just, Your
16 Honor, to -- I don't think I need to do this for Mr. Rosendorf,
17 but because this was not our phase, we are not covering every
18 minute on the phone claims that have been going on, but I know
19 that he has been monitoring it to some extent, and I will check
20 with him at the first break.

21 THE COURT: Okay. Thank you.

22 MS. ESAYIAN: Good morning, Your Honor. Lisa Esayian
23 for the debtors. I wanted to just follow up briefly regarding
24 Mr. Bernick's mention of the plan modifications that we worked
25 out with BNSF. Briefly what I wanted to say is that I'm going

1 to hand out copies, but we recognize that other parties may
2 have some comments on them. We would ask that parties let us
3 know -- let BNSF and us know during the course of today,
4 because if there's some -- I'll say if there's some substantial
5 disagreement with the modifications, it would affect what
6 testimony BNSF puts on this afternoon. Whereas, if there's
7 substantial agreement with the modifications, it would
8 eliminate a substantial portion of the testimony that BNSF
9 would put on this afternoon, which is why we're handing out the
10 modifications this morning.

11 It is also -- there's also one provision in them that
12 we and BNSF may tweak further. We think it's a minor tweak,
13 but my point is that it's subject -- it's not quite a done
14 deal, but we wanted to hand it out to everyone for comments.

15 THE COURT: All right. Mr. Bernick, any other
16 housekeeping?

17 MR. BERNICK: No, I think that we're ready to
18 proceed. Thank you, Your Honor.

19 THE COURT: Anybody else? Any housekeeping matters?
20 (No verbal response)

21 THE COURT: Okay.

22 MR. SCHIAVONI: Oh, Your Honor, I'm sorry. One very
23 quick housekeeping matter. On Friday because of the haste --

24 THE COURT: Mr. Schiavoni, she needs your appearance
25 entered.

1 MR. SCHIAVONI: I'm sorry. It's Mr. Schiavoni for
2 Arrowwood. We handed up unobjected to deposition designations
3 for Mr. Posner, and if I could just put in the record just what
4 the pages were? I physically handed those up. They were pre-
5 designated and shared with all the parties as part of the
6 scheduling of exchanges on those.

7 THE COURT: All right.

8 MR. SCHIAVONI: But it's from the May 6th, 2009
9 deposition. There are only three designations. One was Page
10 144, Line -- starting at Line 22 through Page 149 to Line 23.
11 The other was starting on Page 308 -- starting on Line 8 of
12 Page 308 through Page 314, Line 7. And then the third and last
13 one was Page 334 starting at Line 11 through Page 337 of Line
14 21. Thank you, Your Honor.

15 THE COURT: Okay. Thank you. Anyone else?

16 (No verbal response)

17 THE COURT: Okay, Mr. Lockwood.

18 MR. LOCKWOOD: Your Honor, the plan proponents recall
19 Mr. Elihu Inselbuch to the stand.

20 THE COURT: You'll need to swear him, Jan. I
21 released him earlier.

22 ELIHU INSELBUCH, PLAN PROPONENTS' WITNESS, SWORN

23 THE COURT: Good morning.

24 THE WITNESS: Good morning.

25 MR. LOCKWOOD: Your Honor, for the record, I've

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31

1 handed Mr. Inselbuch the Phase II confirmation hearing witness
2 notebook for Elihu Inselbuch. It's --

3 THE WITNESS: There's other material here.

4 MR. LOCKWOOD: Excuse me?

5 THE WITNESS: I don't know what this is. That says
6 Posner Slide 1.

7 THE COURT: Okay.

8 THE WITNESS: I have this.

9 THE COURT: This is the same notebook that was used
10 before?

11 MR. LOCKWOOD: This was the same notebook that was
12 used --

13 THE COURT: All right. I have it.

14 MR. LOCKWOOD: -- on day one, Your Honor, and we've
15 handed out copies to folks in the audience. Just for the
16 record, I don't anticipate utilizing with Mr. Inselbuch any of
17 the exhibits in the book other than two, and those two are plan
18 proponent Exhibit 277.02, which is the Asbestos PI Trust
19 agreement, and plan proponent Exhibit 277.04, which is the
20 Asbestos Trust PI distribution procedures.

21 THE COURT: All right.

22 MR. LOCKWOOD: Good morning, Mr. Inselbuch.

23 THE WITNESS: Good morning, Mr. Lockwood.

24 DIRECT EXAMINATION

25 BY MR. LOCKWOOD:

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32

1 Q You've testified at some length earlier in the trial about
2 the Trust distribution procedures, and I don't intend to go
3 back into that testimony, but today I want to ask you some
4 questions about some different aspects of the Trust documents
5 and their contents. First, could you identify formally for the
6 record Exhibit 2.77 -- excuse me -- 277.02 in your exhibit book
7 that's before you?

8 A That's the Asbestos Personal Injury Trust agreement, which
9 is a document part of the plan.

10 Q And I want to discuss with you some aspects of that
11 agreement here today and, specifically, could you describe for
12 the Court in a general sense the governance structure of the
13 Trust as reflected in that agreement?

14 A The Trust is governed by three trustees. For certain
15 purposes under the documents, as specified in the documents,
16 the trustees need to either consult with or reach -- or obtain
17 the consent of two entities, one being the Future Claimants'
18 Representative, the other being an entity called the Trustees'
19 Advisory Committee or the TAC.

20 Q Do you recall who the proposed Trustees of the Grace
21 Personal Asbestos PI Trust are?

22 A Yes.

23 Q Could you name them?

24 A Harry Huge, Lewis Sifford, and Dean Trafellet.

25 Q Could you briefly describe for the Court -- and I mean

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33

1 briefly -- a short bio of each of those gentlemen?

2 A Harry Huge is a well-known lawyer originally working out
3 of the Arnold & Porter firm in Washington, very active in civil
4 rights work. In fact, I believe he represented the Indians --
5 the Native American community at some length. Lewis Sifford is
6 one of the foremost trial lawyers in Dallas, Texas. Dean
7 Trafelet is a retired judge in Chicago, who, among other
8 things, administered the asbestos tort docket in Cook County.

9 Q Administers or administered?

10 A Administered. He's retired.

11 Q And who is the Asbestos PI Trust Future Claimants'
12 Representative?

13 A David Austern.

14 Q And do you recall the names of the members of the Asbestos
15 PI Trust Advisory Committee, which I shall refer to hereinafter
16 as the TAC?

17 A I believe so. Joseph Rice, John Cooney, Russell Budd, and
18 Perry Weitz.

19 Q And do those four gentlemen have any other involvement in
20 the Grace bankruptcy case?

21 A They're all members of the Grace Asbestos Creditors'
22 Committee.

23 Q And do you know how they came to be members of the
24 Asbestos Claimants' -- Creditors' Committee?

25 A Well, I mis-spoke. They have clients who are members of

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34

1 the Asbestos Creditors' Committee. Their clients became
2 members of the Committee, because they were appointed by the
3 United States Trustee.

4 Q Now, returning to the TAC for a moment, could you tell us
5 again in a general way what the responsibilities of the Grace
6 -- the proposed responsibilities of the Grace Asbestos PI TAC
7 are under the Trust agreement?

8 A You're asking me as attorney for the TAC? I haven't been
9 retained.

10 Q No. No. No. I didn't -- if I said that, I mis-spoke.
11 Is -- before I -- before I re-ask the question, let me ask
12 another question. You -- with respect to Mr. Sifford, you said
13 he was a trial attorney from Dallas, Texas?

14 A Yes, sir.

15 Q Does he represent asbestos personal injury claimants?

16 A He does not and has never.

17 Q Returning to my aborted question about the TAC, could you
18 tell us in a general sense what the proposed function under the
19 Trust agreement of the TAC is with respect to the Grace Trust?

20 A I can't describe it just in relationship to the Trust
21 agreement. I can describe it in relationship to both the Trust
22 agreement and the TDP.

23 Q Please do so.

24 A -- or Trust distribution procedures. The TAC serves three
25 functions, and the design here is to emulate the design we've

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35

1 had in a number of other trusts where the trusts or the TAC has
2 served those functions as well.

3 First, to facilitate the administration of the trust
4 by helping the trustees, providing them with knowledge and
5 understanding of how claims are administered, what will be the
6 most efficient way for the trustees to deal with the thousand
7 or so law firms around the country that will be presenting
8 claims to the trust, what will be the most efficient way for
9 those law firms to be dealing with the trusts in processing
10 their claims. That involves meetings with the trustees,
11 meetings with the constituency, trying to identify what are --
12 what will be inevitable, which is in the document, that need to
13 be resolved to facilitate easy administration of the process.

14 The second role of the TAC -- and here the role is
15 shared with the Futures Representative -- is to provide a
16 spokesperson for the present asbestos community in the event
17 that it is felt necessary by the trustees or by any other,
18 either the TAC or the Futures Rep, to make certain kinds of
19 changes in the basic outline of the trust or to create certain
20 procedures that are called for by the trust documents and the
21 TDP, so that the intent of the craftsmen of the document will
22 be carried forward as best as possible.

23 The third general area is to keep the constituency at
24 large, the thousand law firms or so, around the country who
25 will be filing claims on behalf of their clients with the trust

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36

1 informed of the progress of the trust and in an effort to make
2 the entire process as efficient as possible.

3 Q Now, are the members of the trust -- as you've described
4 them, they're asbestos plaintiff's lawyers. Correct?

5 THE COURT: The members of the TAC?

6 MR. LOCKWOOD: Excuse me. Members of the TAC. Thank
7 you, Your Honor.

8 A They are indeed.

9 Q And why is that?

10 A Well, they carry with them the requisite knowledge to
11 accomplish these goals that I've just described. They are
12 familiar with the way asbestos personal injury claims are
13 gathered and prepared in plaintiff's firms throughout the
14 country, they being -- they being lawyers whose clients were
15 members of the asbestos committee understand what the goals
16 were in drafting this document in the first place, and they
17 being very well respected members of the plaintiff's community
18 are in a unique position to be able to discuss with the
19 constituency at large what is going on, what needs to be
20 improved, and how that can happen.

21 Q Now, what role, if any, do TAC members have in the
22 processing and resolution by the trust of claims filed with the
23 Trust?

24 A In terms of the individual claims themselves, none.

25 Q Do the TAC members have the right to represent individual

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37

1 claimants in tendering claims to the Trust?

2 A Yes.

3 Q And is it expected that they will do so?

4 A Yes, sir.

5 Q And -- strike that. You've indicated that there are
6 provisions in the Trust agreement concerning the obtained --
7 the obtaining of concurrence by the TAC to certain actions by
8 the trustees. Did the -- does the Trust agreement specifically
9 spell out the types of activities for which such concurrence is
10 required?

11 A Yes, there's a long menu of those situations that is
12 provided in the Trust agreement, and there are additional
13 provisions along that line in the TDP itself.

14 Q With respect to the Trust agreement, just for the record,
15 could you take a look at the exhibit and identify for the Court
16 the specific provisions in that agreement that you've just
17 referred to?

18 A Yes, it's found in Section 2.2F, which is at Pages 11
19 through 13 of the exhibit.

20 Q And you're familiar with this document. Is that fair to
21 say?

22 A I am.

23 Q Did you have a role, either level of responsibility or as
24 a draftsman, in actually creating this document?

25 A I did.

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38

1 Q What was that role?

2 A I was the one ultimately responsible as counsel to the
3 Committee to see to it that the document was satisfactory to
4 the Committee.

5 Q With respect to this particular Grace Trust agreement, is
6 this a novel form of document in your experience?

7 A No.

8 Q Could you tell us to what extent this document is similar
9 or different from trust agreements that have been utilized in
10 plans confirmed previously by bankruptcy courts including this
11 one?

12 MR. PRATT: Objection, Your Honor. Relevance.

13 THE COURT: What are the -- what's the relevance?

14 MR. LOCKWOOD: Just history and background of -- I'm
15 going to get into things that have been changed in this, and
16 I'm just providing a foundation for the proposition about the
17 way things have been created in this case.

18 THE COURT: Well --

19 MR. LOCKWOOD: I'm not going into any details. One
20 question, Your Honor.

21 THE COURT: Okay. To the extent that it's relevant
22 to this case, fine. If it's relevant to the other hundred and
23 so cases, I really don't need to hear it.

24 MR. LOCKWOOD: All I'm asking about is with respect
25 to this document in this case.

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39

1 THE COURT: All right.

2 MR. LOCKWOOD: Does it have progenitors?

3 THE COURT: Okay.

4 A For the most part, this document is a markup of trust
5 agreements that have been crafted over the past seven years in
6 asbestos bankruptcies.

7 Q Turning to the -- returning, rather, to the provisions
8 dealing with the concurrence of the TAC in proposed actions by
9 the trustees, does that -- is that concurrence provide the TAC
10 with an absolute veto over proposed actions by the trustees
11 that are set forth in that section you referred to?

12 A No, neither absolute veto by the TAC or by the Futures
13 Representative. There are provisions that describe how the
14 trustees, if they wish to, can go forward to get a ruling that
15 the TAC or the FCR's refusal to give consent was unreasonably
16 withheld, and, ultimately, there is exit to the Bankruptcy
17 Court to review that.

18 Q And the Bankruptcy Court is which court?

19 A This court here.

20 Q And you mentioned the Futures Rep. What, if any, consent
21 rights does the Futures Rep have under the Trust agreement?

22 A They are identical to the TAC's consent rights.

23 Q Are there other provisions of the Trust dealing with
24 obligations on the part of the trustees to consult with the TAC
25 on certain matters?

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40

1 A Yes.

2 Q And could you tell the Court what those provisions are or
3 where they may be found in that document?

4 A In Section 2.2E at Page 10.

5 Q And separate from the consent rights that you testified
6 about earlier, is there anything in the provisions dealing with
7 consultation that gives the TAC members some form of veto or
8 control over trustee actions?

9 A No.

10 MR. PRATT: Objection, Your Honor, with respect to
11 the word control. I think that calls for a conclusion that's
12 not warranted.

13 THE COURT: Mr. Lockwood.

14 MR. LOCKWOOD: Your Honor, I think the term control
15 -- it's -- I'm referring to is there a provision in the
16 document which purports to do that. I don't think that's a
17 terribly complicated matter. I don't see what's objectionable
18 about it.

19 THE COURT: All right, so the question is does the
20 document provide some -- a provision that gives the TAC members
21 control over the trustees?

22 MR. LOCKWOOD: Relating to the consultation rights
23 that he's talking about as opposed to the consent rights which
24 he talked about earlier.

25 THE COURT: All right. Overruled.

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41

1 A No.

2 THE COURT: I'll note for the record the document
3 will speak for itself.

4 (Pause)

5 Q I want to turn now, Mr. Inselbuch, very briefly to the
6 subject of indirect PI trust claims and focusing for the moment
7 on the Asbestos Trust PI Trust distribution procedures, which
8 is Exhibit 277.04, I believe in your exhibit book.

9 A Yes, sir.

10 Q Are there -- first, do you understand what the term
11 indirect PI trust claims refers to generally?

12 A I believe I do.

13 Q Are there provisions in the Trust distribution procedures
14 for dealing with such claims?15 A There are several. The principal provision is Section 5.6
16 of the TDP which runs from Page 35 to Page 37, and there are
17 some specialized provisions in Section 5.12 and 5.13 that run
18 from Pages 47 through Pages 51.19 Q Are -- to your knowledge, are Sections 5.12 and 5.13
20 provisions that were created specifically in the W.R. Grace
21 bankruptcy case?

22 A They were.

23 Q And just as a very high level overview, why were they
24 created, if you know?

25 A Well, as it was explained to the Committee, there were

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42

1 certain objectors who took the view that in the event their
2 claims actually did arise, there was no provision in the TDP
3 that properly provided for the administration of those claims.
4 So these provisions were put in the TDP with the agreement of
5 the TAC to provide those procedures in what was regarded as the
6 possible event that claims such as those described in either of
7 these two sections might arise.

8 Q You said in your last answer with the agreement of the
9 TAC.

10 A I said -- I meant the Committee.

11 Q Again, at the level of considerable generality, what sorts
12 of claims was Section 5.6 of the TDP intended to deal with?

13 A 5.6, which is the general indirect claims provision, which
14 is similar to provisions in a number of other documents, so
15 this wasn't specially drafted to this case. It deals with the
16 garden variety claim over that a co-defendant might have for
17 contribution arising from the co-defendant suffering a jury
18 verdict, paying the entire jury verdict under circumstances
19 where that verdict included the liability or the potential
20 liability of Grace, and that -- and, thus, the co-defendant
21 became entitled to a claim back against Grace or any of the
22 other joint tortfeasors for contribution. That's the basic
23 concept of the indirect PI trust claim.

24 Q Are there essentially -- is there essentially one set of
25 provisions for all indirect trust claims covered by Section 5.6

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43

1 or is there more than one such set of provisions?

2 A Well, there are two basically in 5.6. What -- the over --
3 overriding concept here is that in the event that a co-
4 defendant in the tort system pays money to a claimant which, in
5 fact, extinguishes that claimants' claim against the Trust,
6 then the co-defendant steps into the claimants' shoes and then
7 can pursue the claim against the Trust in the same way that the
8 claimant could have and can recover back from the Trust the
9 same amounts that the claimant might have recovered from the
10 Trust.

11 In a -- there can be situations where the co-
12 defendant's indirect claim is, shall we say, presumptively
13 valid where, in fact, as part of the process of resolving the
14 claim against the co-defendant, the co-defendant resolves the
15 claim against the trust and obtains a release from the claimant
16 of the claim against the Trust. In that kind of circumstance
17 there would be little dispute as to whether or not the co-
18 defendant had the right to stand in the claimants' shoes and
19 recover the claimants' entitlement from the Trust.

20 But it was recognized, and I think to that degree
21 this section is different from other TDPs. It was recognized
22 that the co-defendants may not necessarily accomplish -- be
23 able to accomplish the result of obtaining a release for the
24 Trust, because the claimant may just be unwilling to provide
25 such a document. So the document here, the TDP, provides a

Inselbuch - Direct/Lockwood

44

1 process by which the co-defendant can demonstrate to the Trust
2 that, in fact, the co-defendant has extinguished the claim
3 against the claimants' claim against the Trust in whole or in
4 part and, thus, is entitled in whole or in part to step into
5 the claimants' shoes and recover from the Trust.

6 Q With respect to the first category that you just
7 described, are those -- are those claims described in the
8 Section 5.6 as some form of --

9 A Yeah, they're called presumptively valid indirect PI trust
10 claims.

11 Q And with respect to the second category of claims, again,
12 as a general matter, what is the process by which an indirect
13 claimant would go about proving up such a claim to the Trust?

14 A Well, the mechanics have not been spelled out by the
15 trustees, but presumably, there would be some form of claim
16 form that would be crafted for the indirect claimant in the
17 same way the trustees will ultimately craft a claim form for
18 the claimants.

19 They will submit their claim to the trustees, and the
20 trustees will either agree with them or they won't agree with
21 them. If they agree with them, so be it. The indirect
22 claimant will then liquidate the claim in the same manner that
23 the claimant could've liquidated the claim. And then the --
24 and be paid at the payment percentage just in the same way the
25 claimant would've been paid.

Inselbuch - Direct/Lockwood

45

1 If the trustees do not agree that their claim is an
2 indirect PI trust claim, the indirect claimant, the joint
3 tortfeasor, has the same appellate right, so to speak, as would
4 a claimant can go to ADR and exit to the tort system to resolve
5 the question of whether or not they would be entitled to enjoy
6 the status of an indirect PI trust claim.

7 Q With respect to the description that you just gave, what,
8 if any, differences between that process and the individual
9 review process for direct claims are there?

10 A None.

11 Q You mentioned earlier in describing the type of claims
12 that were covered by Section 5.6 I believe as contribution
13 claims. Is it only contribution claims or do they also include
14 indemnity or subrogation or a similar type?

15 A They would include all of those claims, but predominantly
16 the concept is best described by thinking about contribution
17 claims. Other kinds of claims that would arise at law based
18 upon the joint tortfeasor paying the liability of the claimant
19 -- of the Trust to the claimant, which might be styled whatever
20 it might be styled under local law, would be included in the
21 same category.

22 MR. LOCKWOOD: Thank you, Mr. Inselbuch. Your Honor,
23 that completes my examination.

24 THE COURT: Good morning.

25 MR. GIANNOTTO: Good morning, Your Honor. Good

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Inselbuch - Cross/Giannotto

46

1 morning, Mr. Inselbuch. I'm Michael Giannotto. I represent
2 the CNA companies in this case. I believe we've met the other
3 day.

4 THE WITNESS: Indeed. Good morning, sir.

5 MR. GIANNOTTO: Good morning.

6 CROSS EXAMINATION

7 BY MR. GIANNOTTO:

8 Q Now, in this case, as I understand it, your law firm, as
9 counsel for the ACC, drafted the Trust distribution procedures.
10 Is that correct?

11 A Yes, sir.

12 Q Okay, and I think you testified earlier this morning that
13 your firm was responsible at least for the initial draft of the
14 Trust agreement as well. Is that correct?

15 A Yes, sir.

16 Q Okay, and I -- in your deposition I think you told us that
17 after those drafts were made, they were distributed to the FCR
18 for their concurrence -- for his concurrence as well?

19 A After they were completed by the Committee and the
20 Committee was satisfied with the documents, they were then
21 distributed for review by the Future Claimants' Representative.

22 Q Okay. Now, the ACC and the FCR selected the trustees for
23 this -- the proposed trustees for this Trust. Is that correct?

24 A That's correct, subject to the approval of the Court.

25 They also discussed who -- the identity of these trustees with

1 the other plan proponents.

2 Q Okay, but the initial let's say nomination of them was
3 done by the ACC in conjunction with the FCR?

4 A That's fair.

5 Q Okay. Now, under the plan, as I understand it, and tell
6 me if I'm wrong, the initial members -- the proposed members of
7 the TAC, the Trust Advisory Committee, were selected by the
8 ACC. Is that correct?

9 A That's correct, subject again to comment by the other plan
10 proponents or any objection that the Court might have.

11 Q Okay, but the plan itself states that the TAC will be
12 selected by the ACC.

13 A Yes, sir.

14 Q Okay. Now, you mentioned that the initial -- the proposed
15 members of the TAC that were initially nominated by the ACC,
16 and let's just call it that, are Mr. Rice, Mr. Cooney, Mr.
17 Budd, and Mr. Weitz. Is that correct?

18 A Yes, sir.

19 Q And they're all prominent asbestos personal injury
20 attorneys?

21 A Yes, sir --

22 Q Okay.

23 A -- and they do other things, too.

24 Q I'm sure they do. And they were all members -- they were
25 all representing their clients on the ACC. Is that correct?

Inselbuch - Cross/Giannotto

48

1 A That's correct, and they also were the four lawyers who
2 constituted the subcommittee -- negotiating subcommittee of the
3 ACC for the purpose of negotiating the plan.

4 Q Okay, so since the -- since the TAC -- I'm sorry. Since
5 the ACC nominated the TAC, in effect, these four individuals
6 who have been nominated for the TAC helped nominate themselves.

7 Is that correct?

8 A Yes.

9 Q Okay, so they voted in favor of themselves on the ACC to
10 be on the TAC?

11 A I believe that's correct.

12 Q Okay, and also since the ACC under the plan has the
13 responsibility to select the trustees, these members of the
14 TAC, or the proposed members of the TAC, were involved in
15 selecting the trustees in this case. Is that correct?

16 A They were.

17 Q Okay. Now, when the ACC was con -- and you're counsel for
18 the ACC. Is that correct?

19 A That's correct.

20 Q Were you --

21 A My firm is.

22 Q Your firm is, and your firm was involved in the
23 deliberations over the selection of the TAC and the trustees.
24 Is that correct?

25 A Yes.

Inselbuch - Cross/Giannotto

49

1 Q Okay. In determining what TAC members to select for this
2 Trust, did the ACC look to consider anyone other than asbestos
3 personal injury attorneys who had clients who were creditors --
4 asbestos PI clients who were creditors of Grace?

5 A The Committee selected its negotiating subcommittee as the
6 four people most knowledgeable of what the purpose of these
7 documents is and how they should be administered in the future.

8 Q Okay, so the answer is no, you did not look beyond
9 asbestos PI attorneys who were representing clients --

10 A Did not look beyond the Committee.

11 Q You did not --

12 A Lawyers on the Committee. Lawyers for the members of the
13 Committee.

14 Q And those lawyers were lawyers representing asbestos PI
15 claimants?

16 A Representing the members of the Committee, yes.

17 Q Okay. Asbestos PI claimants with claims against Grace.

18 A That's why they were on the Committee.

19 Q Okay. Thank you. Now, I think you mentioned this on
20 direct, but if I'm wrong, please correct me, because I don't
21 want to misstate what you stated. But I think you said you
22 expect -- I think that's the word you used -- but I don't want
23 to misquote you. I think you said you expect that these
24 proposed members of the TAC, once the Trust is up and running,
25 will be submitting claims to the Trust on behalf of their

Inselbuch - Cross/Giannotto

50

1 individual clients whom they are now representing on the ACC.

2 A Well, they only represent one client on the ACC. Yes,
3 they will be -- it is of my expectation that they -- that their
4 law firms will be submitting claims for clients to the Trust.

5 Q And I take it from answers to written discovery that I've
6 seen that you would expect that they would -- each of these
7 four individuals who are nominated for the TAC or their law
8 firms would be submitting at least a thousand claims to the
9 Trust. Is that correct?

10 A I would think so.

11 Q No?

12 A I would think so.

13 Q Oh, you think so.

14 A Yes.

15 Q Okay. Thank you. I'm sorry. And again I believe from
16 answers to written discovery served by ACC, I believe you would
17 expect that these members of the TAC will be receiving
18 compensation from their clients in return for making these
19 claims to the Trust once the Trust is up and running.

20 A I would assume so.

21 Q Okay. I believe in your -- in the answers to
22 interrogatories served by the ACC the answer given was that --
23 wait I want to quote it. I want to make sure. "It is likely
24 that that would occur." Would you agree that it is likely?

25 A Yes, sir.

Inselbuch - Cross/Giannotto

51

1 Q Okay. Thank you. And do you believe it is likely they
2 will be -- they will be getting compensated through contingency
3 fee arrangements?

4 A I think it's likely.

5 Q Okay. Now, I believe that the Trust agreement provides in
6 Section 5.2 -- and please correct me if I'm wrong. Tell me if
7 I'm correct -- that the TAC members have a fiduciary duty to
8 all present PI claims to the Trust. Is that correct?

9 A Yes, sir.

10 Q And --

11 A I don't -- I could check the section number, but it's
12 something --

13 Q You --

14 A -- in there.

15 Q Okay. If you --

16 THE COURT: I'm sorry. The -- was that about the TAC
17 or the trustees that --

18 MR. GIANNOTTO: It's about the TAC.

19 THE COURT: Okay.

20 MR. GIANNOTTO: That Section 5.2 of the Trust
21 agreement -- well, let me get --

22 A Yes, sir, that's correct.

23 Q Okay. So as members of the TAC, if this Trust is approved
24 and goes into operation, they will have fiduciary duties to
25 persons in addition to the clients -- their own clients that

Inselbuch - Cross/Giannotto

52

1 they will be representing in submitting claims to this Trust.

2 Is that correct?

3 A Yes, sir.

4 Q Okay, and to the extent that insurance companies are
5 present PI claimants in the form of indirect PI claimants,
6 these members of the TAC will have fiduciary duties to those
7 insurance companies. Is that correct?

8 A To the extent that they have valid indirect claims, that's
9 correct.

10 Q Well, to the extent that they make indirect PI claims, the
11 TAC has to treat them with the same fairness and the same
12 fiduciary duties they would treat anyone, present claim and who
13 makes a claim.

14 A That's not the TAC's job.

15 Q Pardon?

16 A That's not the TAC's job. That's the Trust's job.

17 Q Okay, but they would have a fiduciary duty to the same
18 extent to insurance companies who have indirect PI trust claims
19 as they would have to personal injury disease individuals who
20 submit claims.

21 A Only if they have valid --

22 Q Well --

23 A -- indirect --

24 Q Well, to that --

25 A -- trust claims.

Inselbuch - Cross/Giannotto

53

1 Q -- to that extent they would -- you're saying they would
2 only have fiduciary duties to asbestos PI claimants who submit
3 valid claims.

4 A Correct.

5 Q Okay. I think you mentioned a few minutes ago that the
6 proposed members of the TAC do things other than asbestos PI
7 work. Is that correct?

8 A I believe they do.

9 Q Do you know if any of the -- and you've been involved in a
10 number of these bankruptcies over the past several years.
11 Correct?

12 A Yes, but I've been told that's irrelevant.

13 Q All right. It's -- it won't be for this question.

14 (Laughter)

15 A The proposed members of the TAC, you've known them for
16 quite a few years. Is that correct?

17 A I've known them for various periods of time.

18 Q Okay, and are you generally familiar with their law
19 practices?

20 A Not -- I wouldn't say so.

21 Q Okay.

22 A I know what their asbestos plaintiffs practice is in
23 general. I know a bit about what the rest they do, but I don't
24 -- I'm not familiar enough with each of their practices to be
25 able to recite about them.

Inselbuch - Cross/Giannotto

54

1 Q Well, let me ask you this, and if you're not aware of it,
2 please, just tell me you're not. Are you aware whether any of
3 these proposed members of the TAC or their law firms represent
4 insurance companies who have issued liability insurance to
5 manufacturers, distributors, whatever, of asbestos products?

6 A I don't know.

7 Q Okay. That's fair enough. Okay. Now, the Future
8 Claimants' Representative, under the Trust he is a fiduciary to
9 future Trust claimants. Is that correct?

10 A Correct.

11 Q Okay. Now, how was the Futures Representative chosen? I
12 don't mean how was he selected in this bankruptcy as a whole.
13 I know the Court had to approve that. But how was -- how was
14 he selected to represent the future claimants once the -- in
15 connection with the Trust?

16 A He is the existing Futures Claimants' Representative in
17 this bankruptcy.

18 Q And so for that reason he was selected to represent --

19 A Yes.

20 Q Is that the way it's worked in all the other bankruptcies?
21 I'll strike that. That is irrelevant.

22 A I don't remember.

23 Q Okay. Is the Futures Representative an asbestos personal
24 injury attorney?

25 A He is not.

Inselbuch - Cross/Giannotto

55

1 Q Okay. To your knowledge, do you expect that he will be
2 representing claimants who submit claims to the Trust?

3 A No.

4 Q To your knowledge, will he have any contingency fee
5 arrangements with any claimants who submit claims to the Trust
6 whether present or future?

7 A No.

8 Q Okay. Now, I am going to now turn to some of your other
9 bankruptcies, but I'm going to explain why it's relevant when
10 -- once they object. I think you testified on Tuesday before
11 you were cut off that you have served as counsel for the
12 asbestos Creditors' Committee in a number of bankruptcies over
13 the last 15 years. Is that correct?

14 A Actually, in the last 26 years, yes.

15 Q Okay. Now, I'm focusing on the asbestos bankruptcies with
16 which you've been involved. It's true, isn't it, that the
17 proposed members of the TAC here, as well as the trustees that
18 have been initially nominated by the ACC, have been trustees
19 and TAC members in several other asbestos bankruptcy trusts.
20 Is that correct?

21 MR. LOCKWOOD: Objection, Your Honor. That's so
22 broad and so compound that I don't know how he could give a yes or
23 no answer to that.

24 THE COURT: That's pretty tough. You'll need to
25 break it down a little more if you want a yes or no.

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Inselbuch - Cross/Giannotto

56

1 Q Okay. Let's focus on specific bankruptcies then. As I
2 understand it, you were the counsel for the Asbestos Creditors'
3 Committee in connection with the Armstrong World Industries
4 bankruptcy. Is that correct?

5 A My firm was.

6 Q Okay, and were you involved in it at all?

7 A Yes, sir.

8 Q Okay. Now, isn't it -- now, the three trustees of this
9 Trust I think you mentioned were Mr. Huge, Mr. Trafelet, and
10 Mr. Sifford. Is that correct?

11 A Correct.

12 Q Okay. Isn't it true that Mr. Sifford was the Trustee or
13 is the Trustee of the Armstrong World Industries Trust?

14 A I think he was. I'm not sure he is any longer.

15 Q Okay, but he was at some point?

16 A I believe that's correct.

17 Q How about Mr. Huge? Isn't that also true?

18 A Yes.

19 Q And Mr. Trafelet, he was the Futures Representative for
20 the Armstrong World Industries Trust. Is that correct?

21 A He still is.

22 Q Okay, and the TAC for the Armstrong World Industries TAC,
23 it had a lot of -- it had a number of members, but four of
24 those members are the same four individuals that have been
25 proposed for the TAC here. Is that correct?

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Inselbuch - Cross/Giannotto

57

1 A I can't recite on that.

2 Q Okay. You know what? I --

3 A I don't dispute it, but I can't recite on it.

4 Q No, I'm going to -- I'm going to try to refresh your
5 recollection. I forgot to pass out my notebooks. I'll pass
6 them out now.

7 (Pause)

8 MR. GIANNOTTO: Sorry. Your Honor, may I approach?

9 THE COURT: Yes.

10 MR. GIANNOTTO: Your Honor, would you like a copy?
11 These are exhibits that are designated in exhibits by CNA.

12 (Pause)

13 Q Okay. Mr. Inselbuch, could you turn to Tab 13 in that
14 binder?

15 A Yes, sir.

16 Q Okay, and it's a document with a heading from Armstrong
17 World Industries, and it's entitled "Order Confirming the
18 Fourth Amended Plan of Reorganization." Do you see that?

19 A That's what it says.

20 Q Okay. If you will turn to Page 3 of that document?

21 A Yes, sir.

22 Q And starting at the bottom of the page, Paragraph 4,
23 there's a list of people whom the document indicates have been
24 appointed to be the initial members of the TAC in that Trust.
25 Would you look at that and tell me --

Inselbuch - Cross/Giannotto

58

1 A Yes, sir.

2 Q -- does that refresh your recollection as to whether Mr.
3 Cooney, Mr. Budd, Mr. Rice, and Mr. Weitz were initial members
4 of the TAC in the Armstrong World Industries trust?

5 A No.

6 MR. GIANNOTTO: Okay. Your Honor, I would move CNA
7 Exhibit 13 into evidence. In their -- in this list of
8 objections to our exhibits, the plan proponents listed as the
9 only objection to this relevance, and I believe it is relevant,
10 and I'm going to go through a few other trusts, not a whole
11 lot, three or four, to show that these same players are
12 trustees and TACs in similar trusts. And we believe it is
13 relevant to show that there's a close relationship between
14 these individuals which will lead them to have influence over
15 how the trustees exercise their discretion, and that that is
16 relevant to our concern that these TAC members whom we've
17 argued in legal papers have conflicts of interest, will lead to
18 a trust that will not treat everybody equally and fairly. So
19 that's why we believe it's relevant.

20 MR. LOCKWOOD: Your Honor, we have no objection to
21 the admission of this evidence for the limited purpose of
22 establishing that the individuals denominated in that paragraph
23 were, in fact, nominated as the original TAC members given that
24 Mr. Inselbuch does not recall that fact.

25 THE COURT: Okay. I am willing to accept it for that

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Inselbuch - Cross/Giannotto

59

1 purpose, but I need some designation better than Tab 13,
2 because lots of binders have Tab 13. No, it's CNA Exhibit 13,
3 Your Honor.

4 THE COURT: Oh, it's not -- oh, it's marked -- it's
5 not marked CNA. Oh, I see up at the top as opposed to the
6 bottom. All right. It's admitted for the limited purpose of
7 establishing the initial TAC members in the Armstrong World
8 Industries' case. This is CNA Exhibit 13.

9 MR. GIANNOTTO: Your Honor, I'd also like to admit it
10 for the purpose of it also specifies the trustees of the Trust
11 as well, and I'd like to admit it for that purpose as well.

12 THE COURT: Well, I don't know that the witness has
13 yet said that he can't identify who the initial trustees were.
14 You only asked him about the TAC.

15 MR. GIANNOTTO: I think he actually said that Mr. --
16 I think he actually testified -- please correct me if I'm wrong
17 -- that he was aware that both Mr. Huge and Mr. Sifford had
18 been at least the trustees of this trust.

19 Q Is that correct, Mr. Inselbuch?

20 A Mr. Huge still is. Mr. Sifford was.

21 MR. GIANNOTTO: And so I'd like to admit this for the
22 purpose of showing that they were initial members of the
23 trustees?

24 THE COURT: But his -- why do I need the document?
25 It's not admissible as I understand it in and of its own when

Inselbuch - Cross/Giannotto

60

1 the witness has already stated who the members are? The other
2 document's admissible, because he -- it didn't refresh his
3 recollection, but there is no dispute as to the statement of
4 fact. I don't think there's a dispute as to this statement
5 either.

6 MR. GIANNOTTO: I don't think there's a dispute as to
7 it, but this is documentary evidence and additional to his
8 testimonial evidence that this is the case.

9 MR. LOCKWOOD: Is there some question about the
10 reliability of his testimonial evidence, Your Honor, that this
11 needs to bolster it?

12 MR. GIANNOTTO: Not from me. I trust Mr. Inselbuch.
13 I'd leave it alone.

14 THE COURT: All right. It is cumulative, but to the
15 extent that it is what it is, it's obviously an order of the
16 Court, and the Court can take judicial notice of the fact that
17 this order has been entered and has made a finding of the fact
18 by the District Court. So I suppose it's no harm.

19 MR. GIANNOTTO: Thank you, Your Honor.

20 THE WITNESS: I should point out that neither Mr.
21 Knuti nor Mr. Tully is currently a trustee of this Trust, just
22 McClarity (phonetic) of the Armstrong Trust, although they were
23 initial trustees.

24 MR. GIANNOTTO: Ready to go?

25 THE COURT: Yes, thank you.

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Inselbuch - Cross/Giannotto

61

1 Q Okay. I want to focus on the Owens Corning bankruptcy.

2 That's one where your firm was counsel for the ACC as well?

3 A Yes, sir.

4 Q Okay, and it's true, isn't it, that both Mr. Huge and Mr.
5 Trafelet, who are nominated as Trustees here, were initial
6 trustees of that bankruptcy trust?

7 A Yes.

8 Q Okay, and it's true also, is it not, that the four members
9 of the TAC nominated in this case, the Grace case, were members
10 of the TAC for the Owens Corning bankruptcy trust?

11 A I don't recall.

12 Q Okay. Could you turn to Tab 23 in the book I gave you?
13 And this is CNA Exhibit 23.

14 (Pause)

15 Q Are you there, Mr. Inselbuch?

16 A I'm there, Page 30, Section 7.

17 Q Right. Does that refresh your recollection as to whether
18 Mr. Budd, Mr. Cooney, Mr. Rice, and Mr. Weitz were initial
19 members of the TAC in the Owens Corning bankruptcy?

20 A They were four of the nine.

21 Q But does it refresh your recollection that they were four
22 of the nine?

23 A No.

24 MR. GIANNOTTO: Okay. Your Honor, I'd move to admit
25 this exhibit, which is CNA Exhibit 23, for the same purposes

Inselbuch - Cross/Giannotto

62

1 described earlier.

2 THE COURT: It's admitted for the same limited
3 purpose.

4 Q Okay. Your firm was also counsel for the ACC in the U.S.
5 Gypsum bankruptcy, is that correct?

6 A Yes, sir.

7 Q Okay. Is it true that Mr. Sifford was one of the initial
8 trustees of the U.S. Gypsum Bankruptcy Trust?

9 A I don't recall.

10 Q Okay. Could you turn to Exhibit 26 in your binder? And
11 this is CNA Exhibit 26?

12 A Yes, sir.

13 Q And what this is, is an annual report from the settlement
14 trust for the U.S. Gypsum Trust. Could you look at the first
15 line there and read it to yourself and tell me whether that
16 refreshes your recollection as to whether Mr. Sifford was a
17 trustee of the U.S. Gypsum Trust?

18 A No.

19 Q Okay. Let me ask you this, were the -- do you know
20 whether the -- well, strike that. The TAC in the U.S. Gypsum
21 case, did that include all four individuals who were nominated
22 for the TAC here?

23 A I don't recall.

24 Q Okay. Sticking with CNA Exhibit 26, could you turn to
25 Page 4 of that exhibit and look under Heading C and read that

Inselbuch - Cross/Giannotto

63

1 to yourself, please?

2 A Yes, I have.

3 Q Okay. Does that refresh your recollection as to whether
4 the members of the TAC that have been proposed in Grace are
5 individuals who are all among the members of the TAC that is
6 involved in the U.S. Gypsum bankruptcy?

7 A It doesn't refresh my recollection.

8 MR. GIANNOTTO: Okay, Your Honor, I would move to
9 admit Exhibit 23 for the same purposes as the prior two
10 exhibits I mentioned.

11 MR. LOCKWOOD: Your Honor --

12 THE COURT: I thought it was 26.

13 MR. GIANNOTTO: I'm sorry. It is 26.

14 THE COURT: All right. I'm sorry. Mr. Lockwood?

15 MR. LOCKWOOD: Your Honor, I have a limited objection
16 to this which is that this document refers to a reporting
17 period. It does not, like the previous two documents, relate
18 to the initial membership of either the trustees or the TAC.
19 So, it cannot be for the same limited purpose as before.

20 I would not object to its admission for the
21 proposition of showing that these -- the folks identified were
22 trustees and TAC members as of the reporting period that this
23 document reflects, but I'm not sure that that was the purpose
24 for which it was proffered.

25 MR. GIANNOTTO: No, that's acceptable, Your Honor.

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Inselbuch - Cross/Giannotto

64

THE COURT: All right. It's admitted for that same limited purpose of showing who the trustees and the TAC members were as of the reporting period. This states for the fiscal year ending December 31, 2008.

5 MR. GIAQNNOTTO: And, Your Honor, and I promise this
6 will be the last one.

7 Q Was your firm counsel for the ACC in the AB Lummus
8 bankruptcy? I don't know if I'm pronouncing that correctly
9 A No.

10 MR. GIANNOTTO: Okay. Your Honor, I don't know
11 whether you want me to use now to try to admit documents
12 dealing with Lummus because Mr. Inselbuch does not have
13 knowledge of them, or you want us to try to put them in at the
14 end of the whole insurance case in chief?

15 THE COURT: What -- is the purpose going to be the
16 same thing --

17 MR. GIANNOTTO: The same purpose. If you look at
18 Tabs 10 and 11 -- I'm sorry, Tab 10. I'm sorry. Tab 10
19 indicates that Mr. Trafelet was an initial trustee of the
20 Lummus trust and that the TAC member was Mr. Weitz and I'd like
21 to admit this document just for the purpose of showing that.

THE COURT: Is there any objection?

23 (No audible response)

24 THE COURT: All right. Give it -- tell me again who
25 the members were, please?

Inselbuch - Cross/Giannotto

65

1 MR. GIANNOTTO: That Mr. Trafelet was an initial
2 trustee of the Lummus PI trust and that Mr. Weitz was an
3 initial member of the TAC for that trust.

4 MR. LOCKWOOD: I'm sorry, Your Honor. What --

5 THE COURT: Exhibit 10.

6 MR. LOCKWOOD: Exhibit 10?

7 MR. GIANNOTTO: Ten, yes.

8 THE COURT: He's asking whether or not you will agree
9 to admit Exhibit 10 for the limited purpose of showing that Mr.
10 Trafelet was an initial trustee and Mr. Weitz was an initial
11 member of the TAC of AB Lummus Global, even though this witness
12 cannot substantiate this document because the firm did not
13 represent the ACC.

14 MR. LOCKWOOD: Could I consult with Mr. Bernick --

15 THE COURT: Yes.

16 MR. LOCKWOOD: -- for a moment?

17 (Attorney discussion)

18 MR. LOCKWOOD: No objection, for the same limited
19 purpose as the previous exhibits, Your Honor.

THE COURT: All right. It will be admitted for that purpose.

22 BY MR. GIANNOTTO:

23 Q Mr. Inselbuch, you testified on direct that there are
24 various consent or concurrence, I believe was the word you used
25 powers --

Inselbuch - Cross/Giannotto

66

1 A If I did, I should have said consent because that's the
2 language in the document.

3 Q I think you said concurrence, but I think we all knew what
4 you meant. That there are certain instances where the TAC has
5 consent for things that are going to be done under the trust or
6 the TDP, is that correct?

7 A Yes, sir.

8 Q Okay. And we'll go through them in a second, but I
9 believe you also said in response to Mr. Lockwood's questions
10 that the TAC serves three functions. I want to make sure I
11 have these right. I think you said that the first function is
12 to facilitate the administration of the trust because the TAC
13 members have knowledge and understanding of how to deal with
14 these claims and they have experience, and so they can assist
15 the trustee in dealing with matters that come before the Trust,
16 is that correct?

17 MR. LOCKWOOD: Objection, Your Honor, if he's
18 purporting to quote Mr. Inselbuch's answer, if he's simply
19 trying to ask a general question about whether he gave
20 testimony, you know, substantially to that effect or something
21 like that.

22 Q Did you give testimony substantially to that effect?

23 A With certain differences.

24 Q What were the differences?

25 A I think I included in my description that the TAC members

Inselbuch - Cross/Giannotto

67

1 would be knowledgeable about how the claims were processed and
2 developed inside the 1,000 law firms around the country who
3 would be presenting them to the trust.

4 Q Okay. And, you know, the TAC -- TAC stands for Trust
5 Advisory Committee, correct?

6 A I think so.

7 Q Okay. Now, in order to serve that function to provide
8 this kind of help and advice that you just testified to, is
9 there any reason that the TAC has to have, in effect, consent
10 authority under this trust, why can't they just advise the
11 trustee and give the trustee the benefit of their knowledge?

12 A They don't have consent rights, generally speaking, with
13 respect to the administration of the trust. They only have
14 consent rights where the consent rights are specified.

15 Q Right. But, they have to consent to changes in the TDP,
16 is that correct?

17 A That's different.

18 Q But, they do have to consent to that, correct?

19 A Yes, sir.

20 Q Okay.

21 A Unless their consent is overridden -- their failure to
22 consent is overridden.

23 Q Yes, we'll get to that. In its initial matter the trustee
24 has to seek their consent to change the TDP?

25 A And that of the futures representative.

Inselbuch - Cross/Giannotto

68

1 Q Right. And to change the medical or exposure criteria, is
2 that correct?

3 A Yes, sir.

4 Q And even to hire a claims handling facility to process the
5 claims, they need the TAC's consent for that, don't they?

6 A If it's something outside of the trust, itself.

7 Q Right. They have to -- they have to get that permission
8 and they have to get the TAC's -- the trustee has to get the
9 TAC's consent with the FCR's consent if the trustees want to
10 require the claimant to provide additional kinds of medical or
11 exposure data when they submit their claims, is that correct?

12 A Yes.

13 Q Okay. Now, turning back to the question that I asked you
14 before, and I'll elaborate on it a little bit, I think you said
15 there were three functions of the trustee. You mentioned one
16 just now -- of the TAC, I'm sorry -- you mentioned one just
17 now. A second one I think you said was to provide a
18 spokesperson for present asbestos claimants, is that correct?

19 A No. I said a spokesperson for the purpose of
20 participating in any proposed changes in the methodology of the
21 TDP or the trust agreement.

22 Q Okay. And I guess what I'm getting at is, to be a
23 spokesperson they would have -- they could give their views to
24 the trustee, but there's no need to give them the power to have
25 to consent to what the trustee does if their roll is just as a

Inselbuch - Cross/Giannotto

69

1 spokesperson to make the views of their constituencies known?

2 A I disagree.

3 Q Why do you disagree?

4 A Well, if you're going to change what is the fundamental
5 deal, and you look at the trust agreement and the TDP as the
6 deal or as the plan, because unlike other situations where plan
7 documents are not generally amended over time because the plan
8 has a very short life -- while assets are distributed, this
9 document is going to live for decades. And it was recognized
10 that even people as clever as the lawyers in my firm would not
11 be able to anticipate all the different things that might occur
12 in the administration of the document, in the tort system
13 itself, in medicine, and we were humble enough to suggest that
14 there has to be a way to amend this document.

15 But, if the document is going to be amended to
16 account for those kinds of issues, then the people who
17 represent the constituencies involved need to be at the table
18 and need to agree about it. And that's the purpose of the
19 consent provisions where you're going to affect changes in the
20 structure of the document in the ways -- in the particular
21 cases that are specified in either the trust agreement or the
22 TDP.

23 Q But, the ability to have to consent to these things, that
24 gives these TAC members, does it not, the ability to veto, as
25 it were -- and we'll get back to the Court review -- but as an

Inselbuch - Cross/Giannotto

70

1 initial matter before you get to Court review, veto changes
2 that might be detrimental to their individual clients even
3 though they might be in the interest of the present PI trust
4 claimants as a whole?

5 A No.

6 Q Why not?

7 A First of all, they don't have a veto, as you well know,
8 because their denial of consent can always be overridden,
9 either by the ADR process or by the Court.

10 Second of all, there is no reason to assume why any
11 individual client's interest would be different from the
12 constituencies, at large, if they have valid PI trust claims.

13 Q Well --

14 MR. PRATT: Objection, Your Honor. I'm going to move
15 to strike the latter part of that.

16 MR. LOCKWOOD: Your Honor, I don't believe that
17 somebody other than the questioner can move to strike part of
18 an answer.

19 THE COURT: I think that's probably correct, but what
20 is your objection?

21 MR. PRATT: Your Honor, Mr. Inselbuch is testifying
22 as a fact witness. He's an attorney, but he has not filed an
23 expert report. Now, a fact witness can express opinions and
24 those are admissible under some circumstances. When you look
25 at Rule 701 that spells out what those circumstances are, but

Inselbuch - Cross/Giannotto

71

1 to be admissible the opinion is, it's limited to those that are
2 rationally based on the perceptions of the witness. There's
3 been no foundation for Mr. Inselbuch to talk about that because
4 he's already testified on direct that he doesn't know about the
5 law practices of the TAC members. He disclaimed knowledge of
6 that. He doesn't know, for example, whether they represent
7 insurances companies.

8 What he's trying to do now is express a conclusion or
9 an opinion about that, and I don't think there's a foundation
10 for him to do it. It was not responsive to the question that
11 was asked and that's why I move to strike it.

12 THE COURT: Well, I think it is responsive because
13 the question was, I think, something to the effect of why not
14 when he said no, there was no veto and any action could be
15 overridden, and then he went on to explain why in his view
16 there would be no conflict. So, I think it is responsive, but
17 whether it constitutes lay opinion testimony as opposed to
18 expert testimony, without a report, is a different issue. Mr.
19 Giannotto, response to Mr. Pratt?

20 MR. GIANNOTTO: I will move to strike the answer for
21 the sake --

22 MR. LOCKWOOD: Your Honor, first this is a way of
23 getting around the opening the door kind of problem. If one
24 attorney asks a question that says why not and some other
25 attorney gets to jump up and say, gee, you know, I really wish

Inselbuch - Cross/Giannotto

72

1 he hadn't opened that door.

2 THE COURT: Well, they have different clients.

3 MR. LOCKWOOD: Well, I understand that, but, again,
4 the normal rule is that you can't object to -- he could have
5 objected to the why not question, but you don't get to object
6 to the answer to a question that wasn't objected to.

7 THE COURT: That is correct as a principle of law,
8 and I will stick to it from here on in, but for now the
9 testimony is stricken at the request of Mr. Giannotto. You can
10 --

11 MR. LOCKWOOD: Could I --

12 THE COURT: -- start the question again.

13 MR. LOCKWOOD: Could I, Your Honor, make a second
14 point? It's not -- are you striking as unresponsive or are you
15 striking on the ground that it's not proper lay testimony?

16 THE COURT: It's not proper lay testimony, the latter
17 part is not based rationally on his perception. It's a legal
18 conclusion as to whether or not someone would or wouldn't have
19 a conflict of interest in representing two different entities.
20 I think that's a matter of conclusion of law, not a matter of
21 fact.

22 MR. LOCKWOOD: Your Honor, they're proposing to put
23 up an expert witness as a -- who is a business school professor
24 who's going to --

25 THE COURT: We'll get to that when they do it, Mr.

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Inselbuch - Cross/Giannotto

73

1 Lockwood. Please, let's keep the trial going the way it's
2 supposed to go. The testimony is stricken as outside the
3 perception of a lay witness. If you need to call Mr. Inselbuch
4 back later because of something that happens, you're obviously
5 free to do that.

6 MR. LOCKWOOD: Your Honor, the rule says that you can
7 -- the lay witness who is a professional --

8 THE COURT: Yes.

9 MR. LOCKWOOD: -- can testify about matters that are
10 expert matters without a report, if the matters are within his
11 scope of expertise and his responsibilities.

12 THE COURT: And if they are based rationally on his
13 perception.

14 MR. LOCKWOOD: Right. And Mr. Inselbuch has been
15 presenting TACs and trusts for years.

16 THE COURT: There is no evidence --

17 MR. LOCKWOOD: If there's anybody who has any --

18 THE COURT: There is no evidence on this record that
19 Mr. Inselbuch has represented a TAC or a trust, only about
20 asbestos creditors committee. The objection is sustained.
21 Let's move on.

22 BY MR. GIANNOTTO:

23 Q Okay. In addition to consent powers, I think you
24 mentioned that the TAC has certain consultation rights with the
25 trustee, is that correct?

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1 A Yes.

2 Q Okay. And -- strike that. You talked a little bit, I
3 think, on direct, and you mentioned it earlier in a response to
4 a question that even given these consent powers the Court can
5 always override the refusal to give consent if the consent is
6 withheld unreasonably, or something to that effect, is that
7 correct?

8 A Yes.

9 Q Okay. Let me ask you a foundation question. Have you
10 been involved at all -- the trusts that we've mentioned and
11 others where you've been counsel for the ACC -- have you been
12 involved in the decision-making that goes on after the trust is
13 established as to changing trust procedures and whatnot where
14 the consent of the TAC is required?

15 A Yes. In all of those cases that you mentioned I was
16 counsel to -- and am counsel to the TAC.

17 Q Okay. And could you tell us how often have the trustees
18 gone to the courts in those cases to override refusals to
19 consent by the TAC?

20 A I know of no occasion where that was necessary.

21 Q So, you know of no occasion where it was done, is that
22 correct?

23 A I have no -- I know of no occasion where the consent was
24 refused.

25 Q Okay. I want to turn to something different now, if I

Inselbuch - Cross/Giannotto

75

1 might, and this is in response to -- Mr. Lockwood had mentioned
2 in Court on Thursday or Friday that this was going to be the
3 only time Mr. Inselbuch would -- the second time he'd come back
4 and so if -- something to the effect that if we had any other
5 questions about 524(g) we should ask them now, is that correct?

6 MR. LOCKWOOD: Your Honor, we've stipulated that a
7 number of these insurers and including, I believe, CNA has
8 designated Mr. Inselbuch as an adverse witness in their own
9 cases in chief and we've also agreed that he could be examined
10 as such now.

11 THE COURT: All right.

12 MR. GIANNOTTO: Could I just have a second, Your
13 Honor, to consult with --

14 (Off the record conversation)

15 MR. GIANNOTTO: Okay. Thank you, Your Honor.

16 Q My understanding, Mr. Inselbuch, is that you were involved
17 in the enactment of Section 524(g) of the bankruptcy code, is
18 that correct?

19 A I was involved in the drafting and proposal of various
20 forms of 524(g) in the late 1980s and early 1990s.

21 Q Okay. And my understanding, and correct me if I'm wrong,
22 is that 524(g) was modeled on the channeling injunction and the
23 provisions of the Manville bankruptcy plan?

24 A People say that. If you read 524(h) what you will see is
25 that if the Manville plan, which was then being restructured in

Inselbuch - Cross/Giannotto

76

1 the district court in a class action satisfied the provision of
2 524(g), then it would be covered by 524(g). But, the general
3 concept of the channeling injunction, yes, it was modeled on
4 that as it came out of the Manville bankruptcy.

5 Q And you were counsel for -- I believe you said in your
6 deposition, I don't want to get this wrong, but what the
7 equivalent of the ACC was in that bankruptcy, but it was called
8 something else?

9 A That was called the Asbestos Health Committee.

10 Q Okay. And you were counsel to the Asbestos Health
11 Committee?

12 A From 1985 until the bankruptcy was confirmed --
13 consummated.

14 Q Okay. And the trust that was set up in connection with
15 the Manville bankruptcy, it's true, isn't it, that that
16 received equity stock in the reorganized debtor?

17 A It did.

18 Q Okay. And it also had a right to share and reorganize
19 Manville's profits in the future?

20 A It did.

21 Q Mr. Inselbuch, in connection with other bankruptcies that
22 you have been involved in, have you been involved in
23 negotiating settlements with insurance companies as part of
24 those bankruptcies?

25 A Not directly, I don't believe.

Inselbuch - Cross/Giannotto

77

1 Q By that you mean, what, that you didn't have any
2 face-to-face talks with insurers?

3 A I think that's correct. I don't remember any such
4 discussions off-hand, but --

5 Q Okay. When you say not directly, how did you indirectly
6 -- how were you indirectly involved?

7 A Well --

8 MR. GUY: Objection, Your Honor. I'm not sure how
9 discussions with insurers in other bankruptcies is relevant to
10 this case.

11 THE COURT: Mr. Giannotto, what's the relevance?

12 MR. GIANNOTTO: The relevance is, we've lodged an
13 objection to the plan on the ground that the failure to extend
14 524(g) injunction farther than the plan does will lead to
15 lesser recoveries by the trust. And we want to establish that,
16 if he has the basis for saying it, that the insurance companies
17 will be more willing to put -- to settle and to put larger
18 amounts of money in the trust if they can get 524(g)
19 protection.

20 THE COURT: How would this witness know what's in the
21 mind of an insurance company and whether it would or wouldn't
22 settle under any circumstances?

23 MR. GIANNOTTO: If he's involved in negotiations with
24 them, he'd know what they said to him.

25 THE COURT: What happened in a prior case I've

Inselbuch - Cross/Cassada

78

1 already determined is not relevant. If you want to open these
2 doors, I'm going to open them for all purposes for everyone. I
3 don't understand the relevance of what happened in any other
4 specific case unless it's some historical background which we
5 have plenty of.

6 MR. GIANNOTTO: All right. I'll back down on that
7 then, Your Honor. Can I just consult with counsel?

8 (Attorney discussion)

9 MR. GIANNOTTO: Your Honor, that's all I have. Thank
10 you, very much, Mr. Inselbuch.

11 THE WITNESS: Thank you, sir.

12 THE COURT: Why don't we take a ten minute recess and
13 then we'll reconvene with the next examiner.

14 (Recess)

15 THE COURT: Who's next? Good morning.

16 MR. CASSADA: Good morning, Your Honor. I'm Garland
17 Cassada. As earlier stated, I represent Garlock Sealing
18 Technologies. Garlock is a co-defendant in the tort system and
19 therefore has an interest in the indirect claim provisions of
20 the TDP.

21 THE COURT: All right.

22 CROSS EXAMINATION

23 BY MR. CASSADA:

24 Q Mr. Inselbuch, you have a copy of the TDP before you,
25 don't you?

1 A The what?

2 Q You have a copy of the Trust Distribution Proceeding
3 before you?

4 A I do.

5 Q A few preliminary questions. It's true, isn't it, that
6 asbestos PI claims include claims of co-defendants who might
7 have contribution claims based on joint several liability, is
8 that correct?

9 A I believe that's the plan definition of PI trust claims,
10 yes.

11 Q Yes. Okay. And those claims are enjoined by the
12 channeling injunction and sent to the trust for an exclusive
13 remedy, is that correct?

14 A Yes, sir.

15 Q Okay. Good. It would be true that those -- the persons
16 who hold those claims are beneficiaries of the trust?

17 A To the extent they hold those claims, yes, correct.

18 Q Right. And as beneficiaries, they're entitled to the same
19 fair and equitable treatment that bodily injury claimants are
20 entitled to under the trust agreement, isn't that correct?

21 A In that capacity, for sure.

22 Q Yes. And would it also be true that the co-defendants who
23 might hold contribution claims also should have equal standing
24 in the eyes of the trustees as claimants who hold bodily injury
25 claims?

Inselbuch - Cross/Cassada

80

1 A To the extent that they would become indirect trust claims
2 under the documents, yes. Just because co-defendants have
3 contribution claims in the air doesn't mean that they have an
4 indirect trust claims.

5 Q Okay. But, if there are allegations they have
6 contribution claims, they're barred from making those
7 allegations in the tort system, is that correct?

8 A I don't mean to be picky with you, but if you --
9 they're -- you're saying about contribution claims against
10 Grace, is that what you're saying?

11 Q That's correct. Yes.

12 A Yes. Then the answer is yes.

13 Q Okay. You testified some last Tuesday about the effect
14 that bankruptcies have on the liabilities of co-defendants who
15 remain in the tort system after some companies leave the tort
16 system for bankruptcy, do you recall that?

17 A No.

18 Q You don't recall any testimony to that effect?

19 A I don't.

20 Q You were explaining the basis of the Libby settlement and
21 the extraordinary claims?

22 A I can't say I remember.

23 Q Okay. Is it true that the trust distribution procedures
24 are designed to permit bodily injury claimants to delay
25 asserting their claims against the trust until they've been

Inselbuch - Cross/Cassada

81

1 able to solve their claims against co-defendants in the tort
2 system?

3 A No.

4 Q And that's not a goal of the TDP?

5 A No.

6 Q Absent the channeling injunction, is it true that a
7 claimant like Garlock would be free to join Grace in a -- in an
8 asbestos claim where Garlock has been sued to have Grace's
9 potential liability determined side-by-side with Garlock's?

10 MR. LOCKWOOD: Objection to form, Your Honor.

11 THE COURT: There's no microphone.

12 MR. LOCKWOOD: Objection to form. He's -- Grace is
13 getting a discharge in bankruptcy. This appears to be some
14 hypothetical question and it's asking both a hypothetical and a
15 legal opinion and it's -- he's not even telling you what kind
16 of claims, what the effect of --

17 THE COURT: That's sustained.

18 MR. LOCKWOOD: -- whether --

19 Q Well, asbestos PI claims include contingent claims for
20 contribution, do they not?

21 THE COURT: Was that contention?

22 MR. CASSADA: Contingent.

23 THE COURT: Contingent, oh, thank you.

24 MR. CASSADA: Yes.

25 A I don't know that they include any contingent claims.

Inselbuch - Cross/Cassada

82

1 They include claims for contribution that would lie against
2 Grace, had Grace not gone into Chapter 11.

3 Q Well, the definition is very broad of asbestos PI claims,
4 it includes contingent claims, does it not?

5 MR. LOCKWOOD: What definition? Objection, Your
6 Honor.

7 Q Of asbestos PI claims?

8 A I don't know. You'd have to show me the definition.

9 MR. CASSADA: Okay. Your Honor, may I approach the
10 witness?

11 THE COURT: Yes.

12 Q Yes. Mr. Inselbuch --

13 MR. LOCKWOOD: For the record, could --

14 Q -- I've handed you a --

15 MR. LOCKWOOD: Oh, I'm sorry. Go ahead.

16 Q I've handed you a copy of the TDP. I don't believe it's
17 the current copy because I believe under the current copy the
18 definition of indirect asbestos PI claims have been removed,
19 but the prior TDP included that definition in the footnotes
20 which carried over the definition from the reorganization plan,
21 as I understand it?

22 MR. LOCKWOOD: Objection to the representation, Your
23 Honor. The footnote was removed from the TDP because of
24 objections that it did not accurately reflect the plan
25 definition and therefore it now picks up the plan definition by

Inselbuch - Cross/Cassada

83

1 using the defined term in lieu of the footnote.

2 THE COURT: Okay. I think we need to use the current
3 one, so that everybody's on the same page. Does someone have a
4 copy of the current one, if that's a relevant inquiry?

5 MR. LOCKWOOD: It would be in the plan. That's --
6 there's an -- the plan has been admitted as an exhibit. I
7 think it's PP-277, maybe .01, I'm not sure.

8 MR. CASSADA: Yes. Your Honor, I apologize. When I
9 saw the motion by the debtors to amend the plan I read that to
10 mean that they were removing that definition because it was
11 included in the plan and it was redundant.

12 (Pause)

13 MR. CASSADA: Your Honor, rather than working through
14 the long definition with Mr. Inselbuch, let me see if I can
15 establish whether he has this knowledge.

16 Q Are you knowledgeable that under state law, under civil
17 procedure, that a defendant who's sued in a tort claim can join
18 in the lawsuit of other defendants who might be liable for the
19 same claim?

20 A I know that that's the case in many jurisdictions. I
21 don't know it's the case in all.

22 Q Okay. To the extent that a co-defendant such as Garlock
23 believes that it has that right in a case, in a state that
24 permits joinder, that claim would be enjoined by the channeling
25 injunction, would it not?

1 A That's correct.

2 Q Okay.

3 A All claims against the trust in the tort system are
4 enjoined. The trust doesn't go into the tort system whether at
5 the behest of the claimant or the co-defendant.

6 Q Okay. So, to the extent that Garlock has a right in any
7 particular action to join Grace and have Grace's liability
8 adjudicated side-by-side with Garlock's, then under the plan
9 Garlock loses that right, correct?

10 A And in place of it, just as the claimants do, it gets the
11 right to pursue the indirect claim through the TDP process.

12 Q Okay. But, there's nothing in the TDP process that
13 permits Garlock to file a claim before Garlock has actually
14 paid all or a portion of Grace's share, correct?

15 A That's correct.

16 Q Okay. Let me ask you to look at Section 5.1 of the trust
17 distribution procedure, in particular 5.1(a) (2)?

18 A Yes.

19 Q Are you there?

20 A Yes, sir.

21 Q This provision addresses the effect of the statutes of
22 limitation that are imposed on asbestos PI claims, correct?

23 A Yes, sir.

24 Q Yes. And if we -- I'm going to ask you to skip to the
25 last couple of sentences of this section, but essentially this

1 provision adopts a three-year statute of limitations for
2 asbestos PI claims?

3 A Roughly speaking, yes.

4 Q All right. And that's triggered either by the later of
5 diagnosis or the initial claims payment date?

6 A Yes, so long as the claim was still viable at the time of
7 the petition.

8 Q Right. Okay. So, for any claim that -- where a disease
9 was diagnosed after the petition date, there's a three-year
10 statute of limitations period?

11 A Yes, sir.

12 Q But, this section's qualified by the rights that a
13 claimant may have to defer his claim under Section 6.3,
14 correct?

15 A Not qualified, at all.

16 Q Well, it doesn't affect -- it's subject to the right to
17 defer under 6.3?

18 A The claimant has the right to defer his or her claim.

19 Q Okay. And let's look at Section 6.3, that's on Page 52?

20 A Yes, sir.

21 Q Okay. And under that provision it begins by saying that a
22 claimant can withdraw a PI trust claim at any time without
23 written notice -- or, excuse me -- upon written notice to the
24 PI trust and file another claim subsequently, do you see that?

25 A Yes, sir.

1 Q Okay. So, under this provision if a plaintiff sued
2 Garlock in the tort system it could wait three years before it
3 asserted a claim against the trust, correct?

4 A Yes.

5 Q And it could file a claim against the trust one day before
6 the three-year limitations period without evidence of Grace
7 exposure and then withdraw that claim and have an indefinite
8 period of time to file a claim in the future, is that correct?

9 A Not an indefinite time.

10 Q Well, is there anything in this provision that places a
11 time limit for the claimant to file a claim?

12 A Are you talking about withdrawal or are you talking about
13 deferral?

14 Q I'm talking about withdrawal?

15 A No, there's no limit.

16 Q Okay. So, he could -- so, the claimant could file it ten
17 or 20 years down the road?

18 A In theory.

19 Q Okay.

20 A That's regarded as a good thing for the trust.

21 Q And, in fact, that provision permits claimants in the tort
22 system to delay processing their claims against the trust until
23 they resolve their claim in the tort system, correct?

24 A It would permit that, if that's what they wanted to do.
25 In the same way, they don't have to resolve their claims

1 against Grace in the tort system until they resolve their
2 claims against Garlock in the tort system.

3 Q But, they are, in fact, good reasons for a plaintiff to
4 want to delay their trust claims until they resolve their
5 claims in the tort system, are there not?

6 MR. LOCKWOOD: Objection, lack of foundation.

7 THE COURT: Sustained.

8 Q Well, these trust provisions, in fact, are designed to
9 permit a claimant to avoid having to give credit to defendants
10 in the tort system for payments they're going to get from the
11 trust?

12 A Not so. They were not designed with that in mind, at all.

13 Q Well, that Section 6.3 certainly facilitates that, doesn't
14 it?

15 A I don't know.

16 Q Okay.

17 A Well, I had understood that credits in the tort system or
18 -- only arose if a plaintiff decided to settle, to resolve the
19 liability with one of several joint tortfeasors, not just
20 because the plaintiff chooses to sue or not sue one or another
21 and not just because a co-defendant likes to bring in other
22 parties.

23 Q Well, then you're familiar, I take it, that in some states
24 co-defendants are entitled to automatic credit for any
25 settlement with other defendants, are you familiar with that?

Inselbuch - Cross/Cassada

88

1 A Sure. But, the plaintiff has to decide to settle with the
2 other defendants. They don't have to do that.

3 Q They don't have to settle with Grace either?

4 A That's right.

5 Q Okay. Let me ask you to look at Section 5.7 of the TDP,
6 the last paragraph?

7 A 5.7, what?

8 Q It's 5.7, last paragraph of the provision. It's on -- it
9 appears right before Section 5.8, claims (indiscernible)?

10 A This is in 5.7(b) (3), Grace exposure?

11 Q Yes, sir.

12 A Okay. Got it.

13 Q Okay. You see the last paragraph, first sentence?

14 A Starts with the word "evidence"?

15 Q Yes.

16 A Yes.

17 Q Could you read that sentence for me, please?

18 A Aloud?

19 Q Yes, sir.

20 A "Evidence submitted to establish proof of Grace exposure
21 is for the sole benefit of the PI trust, not third parties or
22 defendants in the tort system."

23 Q Correct. Okay. Mr. Inselbuch, are you familiar with the
24 adage that the public is entitled to every man's evidence?

25 A No.

1 Q You're not familiar with that?

2 A No.

3 Q So, in the tort system would evidence of Grace exposure be
4 for the sole benefit of Grace, or could other defendants use
5 it, as well?

6 A Whose evidence?

7 Q Evidence of Grace exposure?

8 A Put in by whom?

9 Q By the plaintiff?

10 A If it's put in, in open court it would be available to
11 everybody.

12 Q But, the trust isn't an open process, is it?

13 A It's a settlement process and whatever they submitted to
14 Grace by way of settlement wouldn't be available to the public,
15 under any adage.

16 Q Okay. If it's a settlement process, it's not a voluntary
17 settlement, is it? The only way a claimant gets to the tort
18 system is through the trust, is that correct?

19 A The only way anybody gets to the tort system is through
20 the trust, yes.

21 Q Okay. So, to get to the tort system you have to enter
22 into your so-called settlement process, correct?

23 MR. LOCKWOOD: Objection to form.

24 A The whole document is a settlement document. The whole
25 goal here is to resolve by settlement and as efficiently as

Inselbuch - Cross/Cassada

90

1 possible where claims that would have lied -- lain against
2 Grace. That's what this is. This is all a settlement process.
3 It's a settlement process even when an -- when a co-defendant
4 brings an indirect claim.

5 Q So, under the TDP any claim filed against the trust is
6 confidential?

7 A Subject to certain provisions in the document that might
8 require disclosure, that's correct. And those provisions
9 include advising when people -- whether or not the trust has
10 resolved the claim when that becomes relevant to set off issues
11 that may exist in the tort system.

12 Q All right. Okay. So, at least as it relates to
13 co-defendants like Garlock, as far as the trust is concerned a
14 claim filed by a claimant is confidential, the fact of the
15 claim filing?

16 A That's not what I said.

17 Q Well, answer my question.

18 A I did, I thought. I'll say the same thing. It's
19 confidential, except to the extent that the document provides
20 otherwise.

21 Q Okay. And evidence submitted by the plaintiff of Grace
22 exposure in the world of this trust is for the sole benefit of
23 the trust?

24 MR. LOCKWOOD: Objection, evidence submitted where?

25 MR. CASSADA: Evidence submitted to the trust of

1 Grace exposure by a plaintiff.

2 A The document contemplates the applicability of the tort
3 law in each of the jurisdictions of the United States, and the
4 trust will respond to subpoenas that are lawfully issued under
5 the jurisdictions of the United States. So, to me, I don't
6 understand the issue because if Garlock or any other
7 co-defendant is being sued by a plaintiff and Garlock believes
8 the plaintiff has submitted evidence to the trust, why don't
9 they just subpoena that evidence and the proof of claim and
10 whatever else from that claimant who's a litigant with them in
11 the tort system? If they're entitled to that, under whatever
12 adage of evidence you want to use, the Court there will give it
13 to them.

14 Q Well, that would work where the plaintiff hasn't
15 indefinitely deferred the claim under Section 6.3, correct?

16 A It depends on what they filed. They had to file
17 something, if they filed a claim.

18 Q But, they don't need to file evidence of Grace exposure in
19 order to benefit from --

20 A Well, you can take their deposition.

21 Q -- withdraw the claim -- excuse me, let me finish my
22 question.

23 A Sorry.

24 Q A claimant does not have to file evidence of Grace
25 exposure in order to benefit from the indefinite deferral of

1 the claim?

2 A That's correct.

3 Q Okay.

4 A But, there's nothing to prevent you, Garlock, from taking
5 discovery of that plaintiff about what the plaintiff's
6 exposures were.

7 Q Okay.

8 A Just as you do in the tort system, just as you do before
9 there's a bankruptcy when you want to lay off liability on some
10 other co-defendant.

11 Q Well, since you brought up that point, let me ask you to
12 look at another provision?

13 A Okay.

14 Q Look at the last provision in that paragraph, and I'll
15 read this one for you, "Similarly, failure to identify Grace
16 products in claimant's underlying tort action or to any other
17 bankruptcy trust does not preclude the claimant from recovering
18 from the PI trust, provided the claimant otherwise satisfies
19 the medical and exposure requirements of this TDP," do you see
20 that?

21 A Yes.

22 Q Okay. Did I read it correctly, more or less?

23 A Yes.

24 Q Okay. So, under 6.3 in this provision then, a plaintiff
25 could assert a claim in the tort system and sue Garlock and a

Inselbuch - Cross/Cassada

93

1 handful of other defendants, take the position that they are
2 the sole cause of the claimant's disease, resolve their claim
3 and then turn around and file a claim against the trust
4 submitting evidence of Grace exposure and comply with the
5 medical evidence, and under those circumstances the trustees
6 could not preclude that claimant from recovering, is that
7 correct?

8 A No.

9 Q No?

10 A No.

11 Q Okay. So, this provision does not allow a claimant who
12 failed to identify Grace in the tort system and then present a
13 claim to the trust?

14 A There's a difference between failing to identify under
15 circumstances where there would be no need to do so and
16 asserting that there was no exposure to Grace products which
17 was part of your question.

18 Q Okay. Well, let me --

19 A If they do that, then I would suspect -- and that came to
20 the attention of the trustees, I would suspect the trustees
21 would have questions about the viability of their evidence --

22 Q Well, let me ask you --

23 A -- and the believability of their evidence which the
24 trustees are allowed to question.

25 Q Let me change my question then. Suppose in the tort

Inselbuch - Cross/Cassada

94

1 system the plaintiff was asked in interrogatories and in
2 depositions to identify all sources of asbestos exposure that
3 caused an injury?

4 A You could do that now.

5 Q Sure you can.

6 A You could do that after this plan is in place.

7 Q And the claimant does not identify Grace under those
8 circumstances.

9 A Right.

10 Q Is the claimant thereafter precluded from proceeding
11 against the trust?

12 A You would have to -- if I were a trustee and that were
13 brought to my attention, I would look at the form of the
14 question and the form of the answer, and if I believe that the
15 form of the answer created credibility issues I would act on
16 that.

17 Q Yes, but you're not the trustee and the trustee is bound
18 by this document, right?

19 A Yes, and that's what I think this document would call for.

20 Q And this --

21 A This document including this paragraph and the other
22 paragraphs in here that deal with the credibility of evidence.

23 Q This document says that failure to identify Grace products
24 does not preclude the claimant.

25 A That's different from saying, I was not exposed to Grace.

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1 THE COURT: Pardon me. That is not what this
2 document says. So, I think you need to restate the question as
3 to what the document really says. The last sentence says -- if
4 I can find where to begin -- "Similarly, the failure to
5 identify Grace products in the claimant's underlying tort
6 action or to other bankruptcy trusts does not preclude the
7 claimant from recovering from the PI trust, provided the
8 claimant otherwise satisfies the medical and exposure
9 requirements for this TDP." That's what the document says.

10 MR. CASSADA: That's what we quoted earlier, and I've
11 asked him --

12 THE COURT: You did quote it earlier, but --

13 MR. CASSADA: -- questions about how that provision
14 works.

15 THE COURT: But, your newest question did not state
16 that correctly.

17 MR. CASSADA: Well, okay, my question was probing at
18 how the provision works in certain circumstances.

19 Q I want to get you to help us understand how judgments are
20 treated under the TDP. Now, if Garlock -- and I'd refer you to
21 this, to Section 7.7 of the TDP.

22 A This is a judgment against the trust.

23 Q Exactly. So, in a circumstance where a co-defendant like
24 Garlock asserted a claim against the trust and eventually
25 advanced to the tort system and a jury and obtained a judgment

Inselbuch - Cross/Cassada

96

1 against the trust for contribution of \$1 million, then the
2 co-defendant would not get paid \$1 million, correct?

3 A I'd have to go through the arithmetic, but --

4 Q Okay. Well, let me ask you a question and you can -- let
5 me ask it a different way. Any judgment that a co-defendant
6 obtains against the trust is limited by this -- by the TDP in
7 two respects, one, it can't exceed the maximum amount, so if
8 it's a mesothelioma claim it can't exceed \$450,000 --

9 A Well, if it's a --

10 Q -- unless it's an extraordinary claim?

11 A Right.

12 Q Okay. And it also can't exceed the applicable percentage,
13 correct?

14 A The applicable --

15 Q The applicable payment percentage?

16 A Whatever it is, it gets paid at the payment percentage.

17 Q Okay. So, in my example, if Garlock obtained a \$1 million
18 judgment and was not entitled to extraordinary claim treatment,
19 then Garlock would receive the applicable payment percentage of
20 \$450,000, is that correct?

21 MR. LOCKWOOD: Objection, Your Honor. I think that
22 question is very confusing. He said the applicable payment
23 percentage of \$450,000.

24 Q The applicable payment percentage times \$450,000?

25 THE COURT: You -- if this is a meso claim for which

1 Garlock recovered its judgments?

2 MR. CASSADA: Yes, Your Honor.

3 THE COURT: Okay. Do you want to restate the
4 question? I think there a lot of ifs, and it might help to
5 have it all.

6 MR. CASSADA: Okay. Let me see if I can clarify
7 that.

8 Q Under my question, Garlock has obtained a judgment against
9 the trust for contribution for a claim based on mesothelioma --
10 a judgment that Garlock paid on a mesothelioma claim, and
11 Garlock does not qualify for the extraordinary claims treatment
12 --

13 A The claim doesn't.

14 Q I'm sorry?

15 A The claim doesn't qualify for --

16 Q The claim doesn't qualify, exactly, for extraordinary
17 claims treatment.

18 A Right.

19 Q And under those circumstances is it true that Garlock's
20 recovery, total recovery, would be the applicable payment
21 percentage times \$450,000?

22 A Yes, but only in the -- under the methodology of Section
23 7.7.

24 Q Well, there would be -- there would also be provisions
25 about how that judgment would be paid?

1 A Correct.

2 Q Okay. And, I mean, let's just talk about that for a
3 moment. There would be two payments, I take it, the first
4 would be an initial payment?

5 A Yeah.

6 Q And the initial payment would be the applicable payment
7 percentage times the greater of whatever the trust offered
8 Garlock to settle the claim and the award Garlock obtained in
9 non-binding arbitration?

10 A Correct.

11 Q Okay. And then the balance of that judgment would be paid
12 -- the balance of the amount owed to Garlock would be paid over
13 five years beginning in year six?

14 A Over five years -- yeah, just as it provides for
15 claimants.

16 Q Right. And without interest, correct?

17 A Without interest.

18 Q Okay. And that would be true also in my hypothetical with
19 a million dollar judgment, if the payment percentage were 100
20 percent, Garlock still would not get paid that judgment in
21 full, would it?

22 A It would only get paid up to the maximum amount -- a
23 maximum value for the particular category.

24 Q That's 450,000.

25 A Okay. Just as with the claimants.

Inselbuch - Cross/Cassada

99

1 Q And the applicable payment percentage is now estimated to
2 be in the range of 25 percent to 35 percent?

3 A That's what the document says.

4 Q Co-defendants did not have a representative on the
5 Asbestos Claimants Committee, did they?

6 A No.

7 Q And co-defendants don't have -- will not have a
8 representative under the TAC if the plan is confirmed, will it?

9 A On the TAC.

10 Q I'm sorry?

11 A You mean on the TAC?

12 Q Yes, on the TAC?

13 A That's correct.

14 Q And I'm speaking of co-defendants who --

15 A Like Garlock.

16 Q -- a representative like Garlock who might have claims for
17 contribution?

18 A Correct.

19 Q Okay. The indirect -- or excuse me -- the individualized
20 review process for processing of asbestos claims, that process,
21 if you don't go through the expedited review and you go to
22 individualized review, a claimant is entitled to additional or
23 a premium in compensation if the plaintiff's represented by
24 certain law firms, is that correct?

25 MR. LOCKWOOD: Objection.

1 A No.

2 Q Okay. Well, one of the factors that a trust can consider
3 in valuing a claim is the quality of the plaintiff's law firm?

4 A Yes.

5 Q Is that correct?

6 A Okay.

7 Q And, that is, some law firms historically have been more
8 effective than others in representing their clients and getting
9 higher judgments?

10 A Yes, and the jurisdictional values where those law firms
11 exist are different, also.

12 Q Okay. But, all other things being equal, if you got one
13 of the law firms that's deemed to be very affective, you're
14 going to get a higher settlement than if you don't?

15 A Only if you qualify to select that jurisdiction. The
16 claimant's -- the results of in the claimant's jurisdiction --
17 the claimant jurisdiction is a defined term.

18 Q I understand that.

19 A Claimants can't opt to pick any law firm in any
20 jurisdiction around the country.

21 Q Yes, but my question is all other factors being equal.

22 A But, they're never all equal.

23 Q Well, my question assumes they are.

24 A Well, you didn't tell me which law firms you're talking
25 about and what jurisdictions you're talking about.

1 Q I asked you under certain law firms would qualify the
2 claimant for a higher settlement offer than other law firms?

3 A If the claimant could hire that firm just as that claimant
4 will -- that law firm historically gets much higher verdicts
5 against Garlock than other claimant's law firms do. That's the
6 nature of the tort system and they're -- and depending on the
7 jurisdiction, claims against Garlock and everybody else will be
8 either higher or lower, depending upon where the jurisdiction
9 is and what the makeup of juries are. We tried to mirror the
10 tort system as best we could.

11 Q Except when it came to claims for contingent contribution,
12 those do not mirror the tort system, the provisions of the TDP
13 --

14 A They do, indeed, mirror the tort system.

15 Q Well, Garlock is not permitted to file a claim with the
16 trust, is it, based on a contingent claim for contribution?

17 A But, filing a claim is an irrelevance. What you're
18 worried about, and you know what you're worried about, is
19 set-offs. Set-offs only arise where there's a settlement.
20 That's a function of state law. We didn't effect that in any
21 way.

22 Q All right. If Garlock is concerned about obtaining a
23 determination of trust liability then Garlock has no way of
24 triggering that determination under the TDP unless Garlock has
25 paid the trust liability, is that correct?

1 A That's correct.

2 Q Okay. And that provision does not mirror the tort system?

3 A In this -- in order to extricate the trust from the tort
4 system whether the claim is coming from a claimant or a
5 co-defendant we have -- what the channeling injunction does is
6 say neither the plaintiff nor the co-defendant can sue the
7 trust. What they must do is follow the procedures in the TDP
8 which are identical for the claimants and the co-defendants.

9 Q But, the TDP do not allow Garlock or a co-defendant to
10 initiate the trust's determination of liability of a particular
11 bodily injury claim?

12 MR. LOCKWOOD: Objection in any state, in every
13 state? Object to form.

14 Q You misunderstand my question. My question is whether
15 there's a process -- whether the TDP permit Garlock to initiate
16 the resolution of a bodily injury claim?

17 A How could it?

18 Q Simply by allowing Garlock to initiate the resolution of a
19 particular claim.

20 A To do what?

21 Q To file the claim, to file the evidence of exposure and to
22 determine whether the claim warrants a settlement offer.

23 THE COURT: Wait. I'm sorry. Garlock, having
24 already paid the claim and subrogated its rights?

25 MR. CASSADA: No, this is where Garlock -- no, no

Inselbuch - Cross/Cassada

103

1 this is where Garlock has not paid the claim.

2 THE COURT: Well, how would Garlock be able to
3 substantiate that it's a personal injury claimant? I've lost
4 the line of questioning. I'm sorry.

5 MR. CASSADA: Well, maybe it's not worth pursuing.
6 The point is that in the tort system Garlock can file the claim
7 against Grace, even when Garlock hasn't paid a portion of
8 Grace's share, so --

9 THE COURT: You can join Grace as a --

10 MR. CASSADA: Can join Grace.

11 THE COURT: -- co-defendant.

12 MR. CASSADA: That's right, and --

13 THE COURT: But, you can't file a claim against Grace
14 for a personal injury that your client doesn't have.

15 MR. CASSADA: That's exactly what joining does, Your
16 Honor. It permits co-defendants in the tort system to
17 adjudicate Grace's liability.

18 THE COURT: Interliability.

19 MR. CASSADA: Yes.

20 THE COURT: Yes, interliability among the defendants.

21 MR. CASSADA: No, it -- no --

22 THE COURT: You -- it doesn't give the defendant the
23 ability to prosecute the claim on behalf of the plaintiff.

24 MR. CASSADA: It gives the defendant the opportunity
25 to prosecute Grace's liability for a particular claim that has

Inselbuch - Cross/Cassada

104

1 been brought against the defendant. It certainly gives a
2 defendant that right.

3 THE COURT: The co-defendants have certain rights
4 against themselves. That's correct. To defend the liability
5 and to say I didn't do it, the other co-defendant did.

6 MR. CASSADA: Right.

7 THE COURT: That's what you're saying?

8 MR. CASSADA: Yes.

9 THE COURT: Yes. Okay. I'm back with you.

10 MR. CASSADA: Okay.

11 THE COURT: I thought you were saying that you could
12 somehow or other file the complaint as though you were the --
13 your client was the plaintiff in an asbestos bodily injury
14 suit, which is what I think you were -- I thought you were
15 asking this witness, could Garlock assume that it's a personal
16 injury plaintiff and file the claim? I thought that was the
17 question.

18 MR. CASSADA: Well, my question was similar to that,
19 Your Honor. It was just -- it was the point that the TDP do
20 not allow Garlock to initiate the trust's determination of the
21 allowance of a particular asbestos claim.

22 THE COURT: In the tort system?

23 MR. CASSADA: No, in the -- under the trust process.
24 The TDP do not permit that. They do not have --
25 THE COURT: Until the co-defendant pays?

Inselbuch - Cross/Cassada

105

1 MR. CASSADA: That's correct, Your Honor.

2 THE COURT: Yes. Okay.

3 BY MR. CASSADA:

4 Q Now, my final question, at least I hope, Mr. Inselbuch,
5 the members of the Asbestos Claimants' Committee who you've
6 identified as the new members of the TAC, that's Mr. Rice,
7 Budd, Cooney and Weitz?8 A They're not members of the committee. They're counsel to
9 members of the committee.

10 Q They're counsel to members of the committee?

11 A Yes.

12 Q But, they're the ones who meet when the committee has
13 meetings and make decisions about the TDP and other things in
14 the case, correct?

15 A Yes.

16 Q Okay.

17 A With the other lawyers for the other claimants.

18 Q Okay. And these lawyers are among those who would be
19 considered effective lawyers who would get a premium for their
20 clients over --

21 MR. LOCKWOOD: Object to form, Your Honor.

22 Q -- claimants -- plaintiffs represented by other lawyers?

23 THE COURT: Overruled.

24 MR. LOCKWOOD: Object to form.

25 THE COURT: Overruled.

1 A My experience has been that some of them do in some
2 jurisdictions, and some of them don't.

3 Q But, by and large these four lawyers -- when you say some
4 of them do and some of them don't, you're talking about these
5 particular lawyers?

6 A I am.

7 Q Okay. These particular lawyers though have claims and
8 will have claims in the future that would be entitled to
9 premium consideration on the basis of the lawyers representing
10 the claimants, is that correct?

11 A Some may, and some may not.

12 Q Okay. Does the -- isn't it true that the trust agreement
13 permits -- provides that the trustees cannot receive an
14 increase in compensation above the -- an increase indicated by
15 the consumer price index without the consent of these very TAC
16 members?

17 A And the futures representative.

18 Q And the future representative.

19 A Subject, of course, to ADR and exits of the tort system --
20 to the bankruptcy court.

21 MR. CASSADA: Excuse me, Your Honor. I want to
22 confer with my --

23 THE COURT: Yes.

24 (Attorney discussion)

25 Q Retouching, Mr. Inselbuch, on one thing you said earlier,

Inselbuch - Cross/Monaco

107

1 you said that the trust would have to respond to any subpoena
2 by a co-defendant issued out of any court?

3 A Whatever the courts that are specified in the document.

4 Q Okay. And -- okay, but it wouldn't be any court?

5 A No, it's a federal district court, I think. It's the
6 state courts of Delaware, and it's the bankruptcy court.

7 Q Okay. So, if a co-defendant wanted evidence from the
8 trust they'd have to come to Delaware in a bankruptcy --

9 A Yeah, but they can get the very same evidence from the
10 plaintiff in their case in the court where they're pending.

11 Q Of course, if the claim hasn't been filed yet there's no
12 evidence to be obtained?

13 A Then there won't be any at the trust either.

14 MR. CASSADA: Okay. Thank you, Your Honor. That's
15 all I have.

16 THE COURT: Mr. Monaco?

17 MR. MONACO: Good morning, Your Honor.

18 THE COURT: Good morning.

19 CROSS EXAMINATION

20 BY MR. MONACO:

21 Q Good morning, Mr. Inselbuch.

22 A Good morning.

23 Q Mr. Inselbuch, my name is Frank Monaco. I represent the
24 State of Montana and I just have a couple of questions for you.
25 Garlock's attorney covered a lot of the ground that I was going

1 to. Well, first of all, Mr. Inselbuch, I assume you're aware
2 that my client has contribution indemnification claims against
3 Grace as a result of law suits filed by the Libby claimants in
4 the State of Montana?

5 A So, you say.

6 Q And I think you testified earlier on direct that there
7 were no differences in the review process in terms of reviewing
8 indirect and direct asbestos personal injury claims, correct?

9 A That's generally correct.

10 Q Okay. Now, the plan does define the two types of claims
11 differently. There's a definition for indirect asbestos
12 personal injury claims and there's a definition for direct
13 asbestos personal injury claims, correct?

14 A No, they're all -- I believe the last time I looked at
15 this that they're all within the definition of PI trust claim.

16 Q That's --

17 A It's separated out so that these provision can make sense.

18 Q Okay. But, they are defined differently under the plan,
19 correct?

20 A Yes.

21 Q Okay. And there are obviously provisions within the TDP
22 that are specifically designed to deal with indirect asbestos
23 personal injury claims?

24 A 5.6.

25 Q 5.6, and there are some other provisions in there that

Inselbuch - Cross/Monaco

109

1 touch upon those kinds of claims, as well. Now, would you
2 agree, based on the different definition of those types of
3 claims and the fact that there are specific provisions designed
4 to address and direct asbestos personal injury claims, there
5 are some differences between indirect and direct, correct?

6 A I don't know what you're asking.

7 Q Well --

8 A At the end of the day whether it's a direct claim or an
9 indirect claim, it goes through the same process and it's
10 subject to the same rules and can receive the same awards.

11 Q Okay. That's not responsive. My question was --

12 A Sorry, I didn't understand the question.

13 Q -- the process was the same, but are the types and nature
14 of the claims are somewhat different?

15 A I don't think so.

16 Q Okay.

17 A I think the structure of this document says that if the
18 co-defendant frees the trust of its responsibility to the
19 claimant, in general, then the co-defendant steps into the
20 shoes of the claimant and can pursue this claimant's claim
21 under the same set of rules. So, I see them as the same claim.

22 Q Okay. But, there are different ways of dealing with those
23 claims, is there not, I mean why else would you have 5.6?

24 A To say what I just said.

25 Q Now, turning to 5.6, the TDP does limit the allowable

Inselbuch - Cross/Monaco

110

1 amount of an indirect personal injury trust claim to the amount
2 paid to the underlying asbestos plaintiff, correct?

3 A Yes.

4 Q Okay. Would you also agree that there is no specific
5 provision within the TDP that provides for payment of
6 attorneys' fees or other defense costs for indirect claims?

7 A Neither for direct claims or indirect claims. However, if
8 you look at -- it's a little different when you get to 5.12 and
9 5.13. We're revealing about indemnification responsibilities,
10 but generally speaking under 5.6, that's correct.

11 Q Okay. Now, the attorney for Garlock asked you a series of
12 questions regarding the maximum allowable amount in a
13 hypothetical if a co-defendant obtains a judgment in excess of
14 that maximum allowable amount, and would you agree that because
15 of the assignment of a maximum value for asbestos -- direct
16 asbestos personal injury claims, that that could negatively
17 impact a holder of an indirect trust claim if they receive a
18 judgment in an amount excess of the maximum value?

19 A Sorry, I couldn't follow that.

20 Q Going through the line of questioning that Garlock's
21 attorney went through with you obtaining a judgment in excess
22 of a maximum value -- there's a maximum value assigned to --

23 A The four fifty he was talking about.

24 Q Right. Right. So, if a co-defendant obtains a judgment
25 for a million dollars against Grace or --

1 A Against the trust.

2 Q Right. Trust, or there is a judgment rendered against it
3 for a million dollars, against the co-defendant, would that
4 impact negatively their ability to -- the maximum amount affect
5 their ability to obtain monies in excess of the maximum
6 allowable amount?

7 A Well, I think you've mixed up some apples and oranges. I
8 think I testified to Garlock's counsel that if you -- in a
9 litigation against the trust after you've exited through the
10 ADR process in which the co-defendant or the indirect claimant
11 gets a recovery in excess of the maximum value, the recovery is
12 limited to the maximum value. Just because the co-defendant
13 suffers a verdict in the tort system against it, that's in
14 excess of the maximum value, is not relevant to this question
15 because what this -- what the TDP is trying to evaluate is the
16 contribution claim which will not be as much as whatever the
17 verdict might be against the co-defendant in the tort system
18 in the litigation with the plaintiff.

19 Q Okay. But, under my scenario that I've put to you where a
20 judgment is rendered against a co-defendant and now has a
21 contribution indemnification claim that exceeds the maximum
22 allowed amount, could it have a negative impact based on how
23 the TDP is set up currently?

24 A It can only recover up to the maximum value at the payment
25 percentage.

Inselbuch - Cross/Monaco

112

1 Q Okay.

2 A If that is a negative impact, it is a negative impact.

3 MR. MONACO: Thank you. No further questions, Your
4 Honor.

5 CROSS EXAMINATION

6 BY MS. CASEY:

7 Q Linda Casey on behalf of BNSF Railway Company. Good
8 morning, Mr. Inselbuch.

9 A Good morning.

10 Q The TDP treats indirect PI trust claimants as standing in
11 the shoes of the direct claimant and restricts the indirect PI
12 trust claimant to an amount no greater than what the direct
13 claimant could have received under the TDP, correct?

14 A Under 5.6, yes.

15 Q And this restriction on the right of the indirect PI trust
16 claimant to receive more than what the direct claimant would
17 have been able to receive under the TDP would prevent an award
18 to an indirect PI trust claimant who can establish a
19 contractual indemnification agreement that obligates one or
20 more of the debtors to indemnify the indirect PI trust claimant
21 for attorneys' fees and defense costs, correct?

22 A I don't think so.

23 Q Where in the TDP would the indirect PI trust claimant be
24 entitled to an award for their contractual right to get
25 indemnified for attorneys' fees and defense costs?

1 A Your hypothetical is, a co-defendant with a contractual
2 indemnity right?

3 Q Either a co-defendant or an entity who is sued on their
4 own and has a right back to a contractual indemnity to one or
5 more of the debtors?

6 A Where would that come from?

7 Q You are aware that BNSF has asserted that it has a
8 contractual agreement between BNSF Railway and W.R. Grace and
9 its predecessors concerning the operations of the side
10 agreement and the conveyor belt at the Zonolite mine, correct?

11 A Yeah.

12 Q And you are aware that W -- that BNSF has asserted that it
13 has a contractual right for full indemnification for any claims
14 related to that, including claims that arise out of BNSF's own
15 negligence?

16 A I'm sorry?

17 Q That the -- that BNSF asserts that the contractual
18 indemnity protects BNSF or obligates Grace to indemnify BNSF
19 for claims asserting that BNSF itself were negligent, and
20 therefore BNSF could be the sole named party in the lawsuit?

21 A That would not necessarily give rise to an indirect trust
22 claim.

23 Q That would not be channeled to the trust?

24 A It may not give rise to an indirect trust claim.

25 Q So, is it your testimony that if BNSF has a claim under a

Inselbuch - Cross/Monaco

114

1 contractual indemnity that's based upon an underlying asbestos
2 PI claim --

3 A Oh, that's different.

4 Q -- that it would not be enjoined and transferred to the
5 trust?

6 A I didn't understand your question that way.

7 Q Okay. Let me ask the question again. If BNSF asserts a
8 right and is able to establish a contractual right to
9 indemnification of attorneys' fees relating to an underlying
10 asbestos PI claim, is that claim enjoined and channeled to the
11 trust?

12 A I would guess it would be.

13 Q Does the TDP's restriction on the right of the indirect PI
14 trust claimant to only receive the amount the direct claimant
15 receives, restrict BNSF's right to an award if it is able to
16 establish a contractual right to indemnification of its
17 attorneys' fees?

18 A I don't know.

19 Q Do you know whether if the direct claimant would have been
20 able to assert a claim under the TDP for BNSF's defense costs?

21 A Why would he?

22 Q Would he have a right to assert under the TDP?

23 A Why would a direct claimant assert anything on behalf of
24 BNSF?

25 Q And BNSF is restricted to whatever the direct claimant

1 could assert against the TDP -- against the trust?

2 A I think that's right.

3 Q So, we would, in fact, be limited and would not be able to
4 get an award for attorneys' fees, assuming we can establish a
5 contractual indemnification right to attorneys' fees under the
6 TDP?

7 A I have to say, I hadn't thought about that.

8 Q Do you agree that the direct claimant couldn't? BNSF is
9 restricted to what the direct claimant could and therefore the
10 TDP does not allow us to get an award for our contractual
11 rights that are enjoined and channeled to the TDP?

12 THE WITNESS: May I have a minute, Your Honor, to
13 look at the document?

14 THE COURT: Yes.

15 (Pause)

16 A It's an interesting question. I think the principle in
17 5.6 is that the indirect claimant cannot collect more than the
18 direct claimant could recover, where it says, "However, in no
19 event shall reimbursement to the indirect claimant be greater
20 than the amount to which the direct claimant would have
21 otherwise been entitled." I think you're right, that it
22 doesn't say specifically on your set of facts that the claim
23 could include the amount of attorneys' fees. But I think the
24 sense of the argument is that it should, at least up to the
25 amount that the direct claimant could have recovered from the

1 Trust.

2 Q But the direct claimant's claim that the direct claimant
3 can cover to this trust is the rough justice several liability
4 of the underlying medical claim includes no portion for
5 attorneys' fees?

6 A Yes. That's true. But the claim over may not be that
7 large.

8 Q But if the claim over for the medical is even larger than
9 the standard value, there could be no award for the attorneys'
10 fees in excess of that?

11 A If the argument is that -- I must be missing something
12 here. The claimant has a claim against BNSF that you say is
13 channeled.

14 Q Correct. No. The claimant's claim is channeled. BNSF's
15 claim for indemnification --

16 A Is not channeled.

17 Q -- is also channeled?

18 A Right.

19 Q Okay.

20 A So, the claim --

21 Q BNSF then defends the claim --

22 A Yeah.

23 Q -- gets either a judgment or a settlement that has to pay
24 the medical expenses to the PI claimant, also incurs defense
25 costs. They come to the Trust and they assert a claim against

1 the Trust and they attempt to assert their indemnification
2 rights to be indemnified not just for the underlying judgment
3 or settlement but also for their defense costs?

4 A I think they can assert that but they can only recover up
5 to the amount that the direct claimant could recover.

6 Q And the direct claimant, the purpose of the TDP, the
7 maximum value that the direct claimant could recover, is
8 designed to be the several liability that Grace has for the
9 actual medical damage?

10 A It may or may not be as large or larger than what the
11 judgment against BNSF.

12 Q So, let me see if I can understand. If the underlying
13 settlement and judgment was for less than what the standard
14 value is, and the standard value is the applicable maximum
15 value for that particular claimant, then BNSF could get the
16 full amount of the claim, of the underlying liability in the
17 direct claimant's action, and could also get the attorneys'
18 fees up to the maximum value for the standard value, up to the
19 standard value?

20 A I think that's right.

21 Q Now, if the claim that BNSF had, the amount of the
22 settlement or the judgment entered against it for the direct
23 indemnification of the liability, was in excess of the standard
24 value, BNSF would not be entitled to an award for its
25 contractual rights to attorneys' fees and defense costs because

1 it would exceed --

2 MR. LOCKWOOD: Your Honor, I'm going to have to
3 object to the term standard value. I don't believe it's a
4 defined term. I mean, I think the witness and the questioner
5 may understand what she's talking about but I'm not sure.

6 THE COURT: I think we all understand what she's
7 talking about. But if you want to use the terms that are
8 provided in the document, that may be helpful.

9 MS. CASEY: I will, Your Honor.

10 THE WITNESS: Is there a question?

11 THE COURT: She's going to restate the question.

12 THE WITNESS: Thank you.

13 Q I believe the term is scheduled value.

14 A Okay.

15 Q If the -- if BNSF pays either a settlement or a judgment
16 that, in and of itself is in excess of the scheduled value
17 applicable to the direct claimant's claim, then when it asserts
18 its contractual right for indemnity, because the direct
19 liability exceeds the scheduled value, it will not be entitled
20 to an award for the attorneys' fees, even if it can establish a
21 contractual right to be indemnified for the attorneys' fees?

22 A No.

23 Q How is it that incorrect?

24 A You can take the claimant to individual review and, if it
25 merits it, there could be a larger award.

Inselbuch - Cross/Monaco

119

1 Q Is it your testimony that the individual review process
2 permits an award in excess of the maximum values provided by
3 the plan for any particular -- by the TDP for any particular --

4 A Not greater than the maximum but greater than the
5 scheduled value. That's what you asked me about.

6 Q In what circumstances can someone -- can an underlying
7 direct claimant get more than the scheduled value?

8 A If the criteria that are provided for in individual review
9 yield a larger number.

10 Q And the criteria for individual review are all related to
11 medical and exposure criteria, not related to whether they are
12 entitled to defense costs?

13 A That's true but we were talking about a window of
14 opportunity for you. We're not talking about an allocation.

15 Q So --

16 A You could well get a recovery that would be large enough
17 although you couldn't recover more than you paid and you can't
18 get more than the verdict would be but there might be room in
19 there for you to collect attorneys' fees.

20 Q So your interpretation of the TDP provides that BNSF may
21 be entitled to an award for its attorneys' fees if it was
22 successful in having the underlying claimant recover less than
23 what the underlying claimant would have been able to receive in
24 the TDP?

25 A Yes, if you do a good job at trial.

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120

1 Q And, if we end up having to pay what the underlying
2 claimant is entitled to under the TDP, it cuts off our rights
3 to attorneys' fees?

4 A It depends on the numbers.

5 Q Take my assumption. My assumption is we pay to the direct
6 claimant exactly what the direct claimant would have been
7 entitled as a scheduled value through individual review,
8 through arbitration, through trust.

9 A Yes.

10 Q We pay them exactly what the direct claimant would have
11 been entitled. We would not be entitled to an award of
12 attorneys' fees?

13 MR. LOCKWOOD: Objection. She used the term
14 scheduled value --

15 MS. CASEY: I'm sorry.

16 MR. LOCKWOOD: -- and I think she means maximum
17 value.

18 THE COURT: I'm not sure. Are you talking about the
19 settled or the maximum because I'm not sure either.

20 MS. CASEY: I'm actually talking -- I'll take a step
21 back.

22 Q Whatever is the particular maximum that a particular
23 direct claimant is entitled to under the TDP, whether the
24 direct claimant is not entitled to anything more than the
25 scheduled value because it has no extraordinary circumstances

Inselbuch - Cross/Monaco

121

1 or whether they are entitled to the maximum value, if BNSF pays
2 the amount equal to what the direct claimant would have been
3 entitled to completely, BNSF would not be entitled to an award
4 of attorneys' fees under the TDP?

5 A It would not be --

6 MR. GUY: Objection, Your Honor. It's not clear when
7 the counsel for BNSF is asking. Is it the amount that was due
8 to the claimant for BNSF liability or is it the amount that was
9 due to the claimant for Grace's liability? If it's the latter,
10 I'm not clear why they would be paying that.

11 Q Is it not true that in the tort system there are
12 occasions, such as contributory negligence, comparative fault,
13 all those situations, where a defendant will be, in fact, held
14 liable to pay under joint and several liability theories
15 Grace's liability to the underlying claimant?

16 A No. It pays its own liability which may be joint and
17 several.

18 Q Okay. And if it pays joint and several liability which is
19 its own liability, then there would, in fact, be claims that
20 Grace would have had to have paid and therefore, under the TDP,
21 we would have paid amounts that, under the TDP process, the
22 direct claimant could have asserted against Grace?

23 A Right. And you -- in those -- in that set of facts, you
24 step into the direct claimant's shoes.

25 Q Right. And can only get the attorneys' fees that we are

Inselbuch - Cross/Monaco

122

1 contractually entitled to if we paid less than what the direct
2 claimant could have gotten under the Trust, out of the Trust?

3 A I guess that's right.

4 Q And to go to the second --

5 A And then, again, only at the payment percentage.

6 Q Correct.

7 A Now, let's go to the second scenario. BNSF is sued for
8 its own negligence and this is not a liability of Grace. The
9 TDP provides that we are restricted to what the direct claimant
10 could assert and, since the direct claimant would not be
11 asserting the negligence claim against BNSF against the Trust,
12 even if BNSF can establish a binding contractual obligation --

13 THE COURT: I'm sorry. You really lost me.

14 MS. CASEY: Okay.

15 THE COURT: I have no clue what you're asking.

16 MS. CASEY: I'll take a step back.

17 THE WITNESS: Good because I didn't either.

18 Q You are aware that BNSF has asserted that is has a
19 contractual arrangement with the debtors that requires the
20 debtors to indemnify BNSF for claims asserted against BNSF,
21 including asbestos-related claims, even if BNSF was negligent
22 in its own right? Correct?

23 A So you say.

24 Q Okay. I understand that that's just our assertion and I'm
25 not asking the Judge to rule on that right now. If an asbestos

Inselbuch - Cross/Monaco

123

1 claimant asserts a claim against BNSF for BNSF's own negligence
2 that is subsequently determined does, in fact, fall within this
3 contractual indemnity arrangement, is it not true that the TDP
4 that restricts the indirect PI trust claimant from recovering
5 an award against the Trust, the amount that the direct claimant
6 would have been able to assert against the Trust, would prevent
7 BNSF from getting an award for the contractual obligation of
8 the debtors to indemnify BNSF for its own negligence?

9 MR. LOCKWOOD: Objection to form. (a) I don't
10 understand the question but, (b), I think it misstates -- are
11 you saying that BNSF was held liable for an asbestos personal
12 injury claim as defined in the Trust, i.e., one that's based on
13 exposure to Grace vermiculite? Or are you saying that BNSF was
14 held liable because some Grace person at the loading dock
15 dropped a wrench on the head of somebody and, under your view
16 of the indemnity, Grace has to indemnify BNSF for that
17 liability --

18 MS. CASEY: The question assumes --

19 MR. LOCKWOOD: -- because I suggest to you that
20 there's a substantial difference in how the plan would treat
21 those two scenarios. So I object to the form as confusing.

22 THE COURT: Sustained.

23 Q If you would please assume for me that the claim asserted
24 against BNSF for BNSF's negligence, falls within the definition
25 of an indirect PI trust claim --

1 A Then we're back to the same scenario we started with.

2 Q And, therefore, because the direct claimant would not be
3 able to assert against the Trust a claim based on BNSF's
4 negligence, BNSF would not be able to get an award against the
5 Trust for the contractual indemnification obligation to
6 indemnify BNSF for BNSF's negligence?

7 A No, that's not right. If it's a PI trust claim, it's a PI
8 trust claim.

9 Q Can you show me where in the TDP BNSF would be entitled to
10 receive an award for BNSF's negligence?

11 A If it's -- if it is indemnified for a PI trust claim, it's
12 indemnified.

13 Q Is it --

14 A But it's only if it's a PI trust claim. That means it has
15 to be based upon exposure to Grace asbestos.

16 Q And I asked you to assume that. We have asserted in this
17 case, and we will subsequently move into evidence the
18 complaints that have been asserted against us, that BNSF is
19 liable as a result of Grace's vermiculite concentrate, exposure
20 to Grace's vermiculite concentrate. Therefore, the claims
21 against BNSF for BNSF's own negligence in the handling of the
22 vermiculite concentrate, falls within the definition -- well,
23 let me ask you a question. Do you believe that a claim by BNSF
24 for indemnity under the contractual indemnification that BNSF
25 asserts the debtors owe to it for a claim by a creditor who has

1 been injured by exposure to asbestos, based upon BNSF's hauling
2 of Grace's vermiculite concentrate, is enjoined and channeled
3 to the Trust?

4 A I think so. To me, it's not any different from the
5 Garlock claim.

6 Q Okay.

7 A I mean, you have -- may I explain?

8 Q Absolutely.

9 A If you -- a plaintiff may have a claim against a number of
10 defendants that arises out of a particular stream of conduct,
11 here we're talking about exposure to Grace product. If your
12 client, the railroad, is a co-defendant in effect in that
13 process, even if the legal theory against your client is
14 different from the legal theory against Grace, then I don't see
15 why 5.6 wouldn't apply.

16 Q I'm not saying it doesn't apply and I don't think that was
17 my question. My question is, does the restriction in 5.6 --

18 A On what?

19 Q -- that the award can only be limited to what the direct
20 claimant could have asserted against the Trust, prevent BNSF
21 from getting an award when the judgment entered in the lower
22 court or the settlement was based upon BNSF's own negligence,
23 even if BNSF can establish a contractual arrangement in which
24 the debtors agree to indemnify BNSF for its own negligence?

25 MR. LOCKWOOD: Objection, Your Honor. I believe the

Inselbuch - Cross/Monaco

126

1 witness just answered that exact question.

2 THE COURT: Well, let him try it one more time.

3 A Okay. The hypothesis is that somebody sues BNSF and gets
4 a judgment and the judgment, in effect, covers the entire
5 injury, the tort liability damages, and BNSF has the good
6 fortune to pay all of that, now BNSF has a claim over against
7 Grace under the TDP under 5.6. That claim over is -- because
8 they have freed Grace of any liability to this claimant,
9 irrespective of what the legal theory may have been, they've
10 paid the entire tort damages. That's the concept. Then they
11 can come under 5.6 and they can recover what Grace -- what the
12 Grace trust would have paid this claimant.

13 Q The direct claimant?

14 A Yes.

15 Q But that's not my question.

16 A I thought it was.

17 Q My question is, if BNSF pays the full liability --

18 A Yes.

19 Q -- not just Grace's rough justice several share but the
20 full liability --

21 A Correct.

22 Q -- and that full liability includes a portion attributable
23 just to BNSF's negligence, is that portion that's attributable
24 just to BNSF's negligence allowable as a claim against the
25 Trust when the Trust says that it is restricted to the direct

1 claimant's claims against the Trust?

2 A I don't know any tort system that works this way. If BNSF
3 pays a judgment, it has rights of contribution. If the rights
4 of contribution are against Grace, those get decided if Grace
5 weren't in Chapter 11 in a courthouse. It doesn't depend upon
6 what BNSF's sole liability would be. It would depend upon what
7 Grace's contribution would be and here, under 5.6, BNSF can
8 pursue Grace's share of that.

9 Q Once again, you changed my question.

10 MR. LOCKWOOD: Your Honor --

11 Q I'm not asking you about --

12 MR. LOCKWOOD: -- I object. He is not changing it.

13 MS. CASEY: Can I --

14 MR. LOCKWOOD: The questioner appears to be assuming
15 that if a co-defendant becomes jointly and severally liable for
16 exposure to Grace vermiculite because of its independent
17 negligence that somehow or another the fact that the
18 co-defendant's liability was predicated on its own negligence
19 means that it doesn't have a contribution claim against Grace.
20 The witness has now answered three separate times that, in his
21 opinion, it does constitute --

22 THE COURT: No. I think the issue is, if BNSF were
23 to suffer a judgment against BNSF and only against BNSF for its
24 sole negligence, how this would happen, I don't know, but
25 assume that it does. Then, does its theory that it has a

Inselbuch - Cross/Monaco

128

1 contractual claim against Grace, based on indemnification, come
2 into the Trust for payment, and if so, at what level? That's
3 what she's trying to ask.

4 MS. CASEY: And the fact that the witness was
5 answering based on state contribution law and not based on
6 contract law.

7 Q If we have a contract that permits us to assert against
8 Grace the judgment that was for BNSF's negligence, can it get
9 an award under these TDPs under its contract?

10 A Yes. It's the same answer.

11 Q And what is -- the answer is that the TDP does permit a
12 claim --

13 A Yes, if it is indeed a PI trust claim. If it's -- as my
14 counsel said, if it's because somebody dropped a wrench on
15 somebody's head, it wouldn't be a PI trust claim. They could
16 not recover from the Trust. But if it is in fact based upon
17 exposure to Grace product, then it becomes a PI trust claim.
18 Here, it would be irrespective of the independent right to
19 indemnification. You would still have a right to contribution
20 against Grace for the same tort. The little question from
21 before was one about attorneys' fees which you don't get in
22 contribution. That question is still there.

23 Q Is it your testimony that the TDP only allows contribution
24 claims, and as long as my right -- as long as BNSF's right is
25 based on contribution, we can come in and we don't have to

Inselbuch - Cross/Monaco

129

1 worry about the contract because, as long as it's contribution,
2 you can come in?

3 MR. LOCKWOOD: Your Honor, objection. The witness --

4 THE COURT: Sustained.

5 MR. LOCKWOOD: -- previously testified --

6 THE COURT: No. Mr. Lockwood.

7 MR. LOCKWOOD: -- that indemnity -

8 THE COURT: Mr. Lockwood, sustained. You need to ask
9 a question that doesn't have 15 parts to it, please.

10 Q Can you please point out to me, in the TDP, where BNSF is
11 entitled to an award for its full contractual rights of
12 indemnity not restricted by what the direct claimant would have
13 been able to assert against Grace?

14 A As we discussed before, the only issue that you've raised
15 that's interesting is the question of attorneys' fees.
16 Otherwise, we're just going around in a big circle. It's the
17 same under 5.6. Whatever the rubric is in the courthouse, for
18 whatever reason, you suffer the judgment.

19 Q Do you understand that contractual indemnification
20 agreements often modify contribution and a party can, in fact,
21 agree to pay one hundred percent of the liability even if that
22 one hundred percent is greater than its several share?

23 MR. LOCKWOOD: Your Honor, I object. The witness
24 testified on direct that the scope of indirect claims included
25 contribution, indemnity, subrogation, et cetera. This

Inselbuch - Cross/Monaco

130

1 questioner seems to be assuming that the PI trust claim,
2 indirect trust claim, definitions do not include indemnity
3 claims for asbestos PI trust claims. The witness has now
4 testified, I think four times, maybe five, that they do.

5 MS. CASEY: Your Honor, that's a complete
6 mischaracterization of what I'm saying. What I'm saying is
7 that it is, in fact, an indirect PI trust claim and enjoined
8 and channeled to the Trust. But then the TDP does not permit
9 the allowance of an award equal to what the contractual
10 indemnity agreement provides.

11 THE COURT: And the witness has said that, to the
12 extent that it's an asbestos indirect PI trust claim, it's
13 going to be treated under Section 5.6. Period. End of story.
14 So, whatever the maximums are under 5.6 -- if your client
15 sustains this horrible judgment that exceeds all those maximums
16 and, in addition to that, has attorneys' fees, it's going to be
17 capped at the maximums. Do I understand that correctly?

18 THE WITNESS: Yes, ma'am.

19 G And that that maximum is designed to be Grace's several
20 share of the liability, the rough justice several share of the
21 liability?

22 A No. No. The scheduled value is designed to be Grace's
23 rough justice share of several liability. The maximum is
24 something beyond that.

25 Q Well, let's explore whether BNSF will be able to get the

Inselbuch - Cross/Monaco

131

1 maximum value. The maximum value is only available to direct
2 claimants who establish a right to an extraordinary claim,
3 correct?

4 A Wrong.

5 Q Where else is a claimant entitled to go up to the maximum
6 value?

7 A In individual review.

8 Q But in the individual review, they have to establish a
9 right to an extraordinary claim?

10 A Wrong. If they establish the right to be treated as an
11 extraordinary claimant, the maximum value is multiplied by
12 either five or eight percent times.

13 Q I apologize. I'm wrong. The eight times multiplier which
14 was designed to deal with the situation where a claimant can
15 establish that 95 percent of its exposure was to Grace asbestos

16 --

17 A And they can't collect from you.

18 Q And they can't collect from me.

19 A Right.

20 Q So, as soon as they collect from me and I come in and I'm
21 restricted to what the direct claimant could have recovered,
22 I'm never entitled to that eight times multiplier, am I?

23 A That's correct. I would assume not.

24 Q So, I would, in fact, be limited to the scheduled value?

25 A Wrong. You would be limited by the maximum values.

1 Q The maximum value which does not include the eight times
2 multiplier?

3 A Correct.

4 Q And the maximum value is still intended to be the rough
5 justice several share under certain circumstances?

6 A Wrong.

7 Q What is it intended to be?

8 A It's -- the rough justice several share is what the
9 schedule value provides. The maximum value provides room when
10 cases are different for one reason or another and can prove
11 under the indirect -- under the provisions here for individual
12 review, the various criteria can prove up a greater value,
13 which would be more than the rough justice several liability of
14 Grace.

15 Q But it would be potentially less than the actual liability
16 in the tort system?

17 A Everything is potentially less than something.

18 Q And when a party has entered into a contractual indemnity
19 in which Grace has agreed to the full indemnification of all
20 claims, BNSF is nevertheless not entitled to assert -- to an
21 award equal to what it's contractual rights are? It is limited
22 by the TDP?

23 A There's no way to know that. If you do a good job at
24 trial, you might come in well below the maximum. I don't know.

25 Q The question is, though, since the TDP limits BNSF to the

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133

1 amount that the direct claimant is entitled --

2 A Yes.

3 Q -- and the amount that the direct claimant is entitled is
4 intended to be Grace's several share whether it be the
5 scheduled value or the maximum value because there are some
6 extraordinary circumstances that require that several share to
7 be a greater amount, BNSF is limited to that determination of
8 the several share even if its contractual indemnity obligation
9 entitles it to full indemnification?

10 MR. GUY: Objection, Your Honor.

11 MR. LOCKWOOD: Objection to form.

12 THE COURT: Sustained.

13 MS. CASEY: I have no further questions.

14 THE COURT: Anyone have a short period of time, maybe
15 20 or 30 minutes' worth? If so, we'll -- no? Are all of the
16 insurers and other parties, third parties, who are intending to
17 question Mr. Inselbuch, asked your questions so that we're
18 going on to redirect? Mr. Speights, you still have some? Mr.
19 Davis?

20 MR. DAVIS: One line of question.

21 CROSS EXAMINATION

22 BY MR. DAVIS:

23 Q Mr. Inselbuch, I represent National Union Fire Insurance
24 Company of Pittsburgh, PA, which has as a proof of claim which
25 includes within it an element of attorneys' fees in its

Inselbuch - Cross/Davis

134

1 capacity as a surety. As I understand it, the plan as written
2 is intended to put surety claims into the capacity of indirect
3 claims in Class 6. Is that your understanding?

4 A I don't know.

5 Q You don't know. From what I just heard of the BNSF cross
6 examination, if a claimant, for instance, ultimately could not
7 establish any claim at all because perhaps there was no
8 illness, and therefore the claimant had no entitlement to
9 recovery whatsoever, then someone in BNSF's position would have
10 no ability to get its legal fees at all, would it?

11 A BNSF's claim over is predicated on the claim being a PI
12 trust claim.

13 Q Right. But the PI --

14 A If it doesn't have any rights as a PI trust claim --

15 Q Right.

16 A -- then there's no claim over.

17 Q Right. So, BNSF would not get its legal fees dealt with
18 at all?

19 A It would get nothing.

20 Q Exactly. Similarly --

21 A This is the wrench dropped on somebody case.

22 Q Well, not -- bear with me a moment. Maybe that's exactly
23 the point because the issue isn't what's a fair recovery. The
24 issue isn't what's the recovery going to be. The issue is
25 going to be -- the issue is classification. Should that wrench

Inselbuch - Cross/Davis

135

1 -- should that legal fee claim be in Class 9 instead of Class 6

2 --

3 A Now you're going beyond me.

4 Q -- because there is no provision for it?

5 A Now you've gone beyond me. I don't --

6 Q Yeah. And let me go to my claim, my client's claim.

7 Well, really, let me go to the point. Did your committee
8 represent my client?

9 A Pardon?

10 Q Did your committee represent my client?

11 A In the event that your client currently has an asbestos
12 personal injury claim against the Trust, it represents those
13 interests.

14 Q Right.

15 A I'm sorry. Against Grace.

16 Q Suppose the BNSF claim that we talked about, for legal
17 fees only, legal fees only arising from indemnity where there's
18 no personal injury claim establishable after the fact, did your
19 committee represent BNSF's interest?

20 A Do you represent BNSF?

21 Q Did you -- No, I don't.

22 A I don't think we represent any -- the committee acts for
23 anything other than the asbestos personal injury claims.

24 Q Right.

25 A That's why you're here --

Inselbuch - Cross/Davis

136

1 Q So is it fair to classify --

2 A -- and BNSF has their own lawyers.

3 Q -- is it fair to classify a party that your committee
4 didn't represent in the class that your committee created?

5 MR. LOCKWOOD: Objection, Your Honor. He's asking
6 for a legal conclusion on a bankruptcy law matter from a
7 witness that certainly hasn't been tendered for that purpose.

8 THE COURT: That's sustained.

9 Q Did your client -- did your committee, in fact, exercise
10 its efforts to maximize the recovery for claims for attorneys'
11 fees where there was no underlying injury where that -- even if
12 that claim is relegated to your class?

13 MR. GUY: Objection, Your Honor.

14 MR. LOCKWOOD: Objection.

15 MR. GUY: The issue of whether the committee did or
16 what it didn't do isn't before the Court. The question is what
17 the plan does or doesn't do.

18 THE COURT: That's sustained, but I think this
19 witness has already said that, to the extent there is not an
20 asbestos personal injury claim that the Trust is going to take
21 cognizance of, then somebody having an indirect claim based on
22 a claim that doesn't exist against the Trust, isn't going to be
23 paid. I don't know how it could be paid.

24 Q Well, let's go to my claim. My claim consists of a small
25 piece of legal fees, because the remainder of it has been

Inselbuch - Cross/Davis

137

1 transferred, but the claim that remains with my client is for a
2 small amount of legal fees --

3 A The claim against Grace?

4 Q Against Grace, arising from a general agreement of
5 indemnity to a surety who provided assurance of a settlement of
6 asbestos PI claims. Regardless of whether that claim belongs
7 in Class 9 or Class 6, my question to you is when you
8 negotiated Class 9, were you cognizant of the interests of that
9 claim and did you seek to maximize it?

10 MR. LOCKWOOD: Your Honor, I object. This -- what
11 he's doing, he acknowledges that the claim arose out of a
12 settlement of asbestos personal injury claims. He also
13 acknowledged that the claim then got split between his client
14 and some other -- and somebody else, I believe Long Acre
15 actually holds the rest of the claim. He's now asking this
16 witness whether the committee anticipated the splitting of a
17 claim such that all that remains --

18 MR. DAVIS: Not at all.

19 MR. LOCKWOOD: -- of one piece of it is some
20 attorneys' fees, whether the committee wanted to maximize the
21 recovery on that little split of the claim that -- I mean, this
22 is just -- I object to the form. I object to lack of
23 foundation. I object to the competence of the witness to
24 answer the question. And I'm sure there are other valid
25 objections as well that I haven't thought of.

Inselbuch - Cross/Davis

138

1 (Laughter)

2 THE COURT: I haven't heard that this witness did
3 anything to negotiate Class 9 claims and that was the question.

4 MR. DAVIS: Correct. That was the question.

5 THE COURT: So, could we substantiate the foundation
6 first? The objection to the foundation and whatever else there
7 was is sustained.

8 Q Mr. Inselbuch, did you negotiate Class 9 claims?

9 A With whom?

10 Q With the other plan proponents?

11 A In terms of the documents, the plan documents?

12 Q In terms of the recovery.

13 MR. LOCKWOOD: Objection, Your Honor. Does Mr.
14 Inselbuch know what he's referring to --

15 THE WITNESS: No.

16 MR. LOCKWOOD: -- by Class 9 claims?

17 THE WITNESS: I do not.

18 MR. LOCKWOOD: Could you please lay a foundation?

19 MR. DAVIS: I'm sorry.

20 Q The plan provides for Class 6 which is the asbestos
21 claimants and Class 9 which is general unsecured claimants.

22 Are you aware of that?

23 A No, but I'll accept it.

24 Q Okay. Your committee negotiated for the benefit of Class
25 6 claimants, did it not?

1 A Negotiated for its constituency. Smarter lawyers than I
2 call them Class 6.

3 Q Did you negotiate for the benefit of everybody who is
4 relegated to Class 6?

5 A Since I don't know what Class 6 says, I can't answer you.
6 I don't know.

7 MR. DAVIS: Nothing further, Your Honor.

8 THE COURT: All right. We'll take a lunch recess
9 until one o'clock.

10 (Recess)

11 COURT CLERK: Be seated.

12 THE COURT: Mr. Inselbuch. Are you ready for
13 whoever's next?

14 THE WITNESS: Yes, ma'am.

15 THE COURT: Who's next? Mr. Speights?

16 MR. SPEIGHTS: Your Honor, I'm ready to cross examine
17 Mr. Inselbuch. However, I am informed that Mr. Rosendorf is on
18 the phone. I don't know if you'd like to ask him the question
19 that you asked me early this morning.

20 THE COURT: Oh, all right. Mr. Rosendorf, I was
21 asking the parties this morning whether they would agree that,
22 without the need for a witness being called to support this
23 fact, that I could find as a fact that the Trust would qualify
24 as a qualified settlement fund for Internal Revenue Service
25 purposes. And Mr. Speights said that he wanted you to have the

Inselbuch - Cross/Speights

140

1 ability to answer that question.

2 MR. ROSENDORF: Thank you, Your Honor. Can you hear
3 me? I'm not sure if my line is on mute or not.

4 THE COURT: Yes. We can hear you.

5 MR. ROSENDORF: Very good. Your Honor, for tax
6 purposes, we do not have an objection to that being introduced
7 by a submission rather than testimony. We do have other issues
8 with the 524G trust but they are not tax issues.

9 THE COURT: All right. Is there some purpose other
10 than for Internal Revenue purposes that I'd have to make this
11 finding?

12 MR. ROSENDORF: No, I don't believe so.

13 THE COURT: Okay. That's fine. I didn't see why
14 either. All right. Thank you, Mr. Rosendorf. I appreciate
15 it.

16 MR. ROSENDORF: Thank you.

17 THE COURT: Okay, Mr. Speights.

18 CROSS EXAMINATION

19 BY MR SPEIGHTS:

20 Q Good afternoon, Mr. Inselbuch.

21 A Good afternoon, Mr. Speights.

22 Q Mr. Inselbuch, is it correct to say that you have not
23 represented the asbestos PI committee in every plan
24 confirmation involving a 524G trust?

25 A I think that's correct.

1 Q I believe one bankruptcy that was not mentioned today was
2 National Gypsum Company. Now, you're aware that that was an
3 NGC bankruptcy, aren't you?

4 A Yes, sir.

5 Q And that was a 524G trust?

6 A I don't know. I take your word for it.

7 Q And, in addition, during the pre-confirmation phase, you
8 were not involved in the Celotex bankruptcy, were you?

9 A Marginally.

10 Q You did not represent the PI committee in the Celotex
11 bankruptcy prior to confirmation, correct?

12 A That's correct.

13 Q And since confirmation of the Celotex bankruptcy, you have
14 represented the PI TAC in that case?

15 A Not directly after confirmation or consummation of plan
16 but at some time thereafter and continuing until today.

17 Q Now, you are certainly very aware and very knowledgeable
18 about 524G. Is that a fair statement?

19 A I'm aware of it and I think I have knowledge of it.

20 Q And you've worked with it extensively?

21 A It's not something that I've worked with. No. It's the
22 law.

23 Q Well, Mr. Inselbuch, would you agree with me that 524G
24 speaks in terms of a trust in the singular and never speaks in
25 terms of trusts in the plural?

Inselbuch - Cross/Speights

142

1 MR. LOCKWOOD: Objection, Your Honor. This is asking
2 the witness to testify about the law, about what the statute
3 says.

4 THE COURT: Doesn't the statute speak for itself?

5 MR. SPEIGHTS: Well, it lays a foundation for some
6 additional questions, Your Honor.

7 THE COURT: All right.

8 MR. SPEIGHTS If he doesn't recall what the statute
9 says, I have it here but I'd like to establish that 524G itself
10 refers to trust in the singular.

11 THE COURT: All right. He may answer if he -- Mr.
12 Inselbuch, you may answer if you know.

13 A I think that's correct but I couldn't be sure.

14 Q Let me --

15 A It's a very complicated statute.

16 Q That we agree upon. Let me hand you a copy right out of
17 the U.S. Code of 524G.

18 MR. SPEIGHTS: May I approach the witness?

19 THE COURT: Yes, sir.

20 Q And I believe it starts at the bottom of the first page,
21 and I have attempted to go through and underline everywhere the
22 word appears, and at least in those ten instances, would you
23 agree with me that everywhere the word trust appears, it's in
24 the singular, either a trust or the trust?

25 MR. GUY: Your Honor, we don't have a copy of what's

Inselbuch - Cross/Speights

143

1 been underlined by counsel but I would stipulate for my part
2 that the provision says what it says in the Code and I don't
3 know that it's helpful to go through line by line, saying when
4 it says trust and when it says trusts.

5 THE COURT: Anyone else agree that the Code says --
6 or that Section 524G says what it says? All right.

7 MR. LOCKWOOD: So stipulated, Your Honor.

8 UNIDENTIFIED ATTORNEY: Your Honor, I'll agree with
9 it.

10 MR. SPEIGHTS: I'll stipulate that the sun rises in
11 the east, Your Honor, but that's -- I think the only question
12 is does he agree, at least, in those ten instances which I've
13 underlined in the language, it's in the singular.

14 A Yes, that's what it says. Want it back?

15 (Pause)

16 Q Would you also agree with me, Mr. Inselbuch, that in the
17 Celotex bankruptcy, the plan of reorganization provides for one
18 trust which pays asbestos property damage and personal injury
19 claims?

20 MR. LOCKWOOD: Objection. Relevance.

21 THE COURT: I'm sorry. The question was whether this
22 trust does that?

23 MR. SPEIGHTS: No, Your Honor.

24 THE COURT: I'm sorry.

25 MR. SPEIGHTS: I asked him would he agree with me

Inselbuch - Cross/Speights

144

1 that, in the Celotex bankruptcy, there is one trust which pays
2 both PI and PD claims.

3 THE COURT: The relevance objection is sustained.

4 Q Would you agree with me that there has been litigation in
5 the Celotex bankruptcy post-confirmation between the Celotex
6 asbestos trust and the PI TAC which you represent on one side
7 and asbestos PD claimants on the other side?

8 MR. LOCKWOOD: Objection. Relevance.

9 THE COURT: What's the relevance, Mr. Speights?

10 MR. SPEIGHTS: Pardon me?

11 THE COURT: What is the relevance?

12 MR. SPEIGHTS: Your Honor, the relevance is I'm going
13 to try to get Mr. Inselbuch to identify Anderson's Exhibit 40
14 which I think is directly relevant for a number of matters. I
15 hope he can identify it and we can avoid having to bring a
16 witness here, by the way, and it's foundation to introducing
17 Anderson Exhibit 40.

18 MR. LOCKWOOD: Your Honor, what is Anderson Exhibit
19 40?

20 THE COURT: If you would show it to Mr. Lockwood, Mr.
21 Speights?

22 MR. LOCKWOOD: Maybe we have it here. I think we've
23 got it.

24 (Pause)

25 MR. LOCKWOOD: I'm going to object on the relevance

1 of Anderson Exhibit 40 so, saying that this is laying a
2 foundation for it, doesn't cure anything, Your Honor. I mean,
3 I'll read you the title of it. It's an order from the Celotex
4 bankruptcy court captioned, "Order on Asbestos Settlement Trust
5 Motion Seeking Instructions Regarding Payment of 52 Asbestos
6 Property Damage Claims Submitted by Anderson Memorial
7 Hospital." I mean, I can't even begin to imagine what the
8 relevance to that has to this case.

9 THE COURT: Well, I'm not sure either so maybe, if
10 you could tell me what that relevance is, maybe I can back into
11 objection that's before me now.

12 MR. SPEIGHTS: If I might, Your Honor, let me try a
13 couple more questions and I have a feeling we'll end up back at
14 the same place and I will have to educate the Court and Mr.
15 Inselbuch about where I want to go with this.

16 THE COURT: All right.

17 MR. SPEIGHTS: But at least let me try to set a
18 little more foundation.

19 THE COURT: Okay.

20 Q Mr. Inselbuch, is it fair to say that the asbestos PI
21 committee's position in this case is that there should be only
22 -- there should be separate trusts for the asbestos PI
23 claimants on the one hand and asbestos PD claimants on the
24 other hand?

25 A That subject may have come up at a committee meeting at

Inselbuch - Cross/Speights

146

1 some point but I don't recall it.

2 Q Do you recall that the PI committee advised Judge Wolin
3 when he had the case that the PI committee wanted to have a
4 separate trust for PI claims?

5 A I don't recall.

6 Q Are you telling us, Mr. Inselbuch, that you don't care
7 whether there's one trust or two trusts? That is, the PI
8 committee doesn't care whether there's one trust or two trusts
9 in this bankruptcy -- of Grace bankruptcy?

10 A I'm not saying that.

11 MR. LOCKWOOD: Objection. I don't know how a PI
12 committee can care about something, Your Honor.

13 THE COURT: Sustained.

14 Q Do you have -- does the PI committee have a position as to
15 whether there should be one trust for PI and one trust for PD
16 or one trust for all asbestos claimants?

17 A I think I tried to answer that. I don't recall the
18 subject so I can't recall what the committee's view is of this
19 if I don't recall what, if any, discussion there was of it. As
20 we sit here today, we have whatever the plan is that's on the
21 table.

22 Q Do you recall the members -- I'm not asking you who they
23 are yet but do you recall any of the members of the PI TAC
24 in the Celotex case?

25 MR. GUY: Objection. Relevance, Your Honor.

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1 THE COURT: Well, I let this in before. I'm not sure
2 what the relevance is going to be but I'll let it in again.
3 Overruled.

4 A As of now?

5 Q Yes.

6 A I'm not sure.

7 Q Well, do you -- would you agree that both Motley Rice and
8 Baron and Budd have been members of the PI TAC in Celotex?

9 A Yes.

10 Q And would you agree that those two law firms are members
11 of the TAC and members of the negotiating committee with
12 respect to the W.R. Grace bankruptcy?

13 A Yes.

14 Q I believe you said that you were involved in the
15 negotiation of the plan of reorganization with the debtors in
16 equity, is that correct?

17 A No, I don't think I said that.

18 Q Were you?

19 A I don't know what you mean by involved.

20 Q Mr. Weschler has stated that the chief negotiative PI was
21 Mr. Rice. Would you agree with that?

22 A If Mr. Rice is in the room, he's the chief.

23 (Laughter)

24 Q Would you also agree that Mr. Shelnitz was involved in
25 negotiations of the deal on behalf of the debtors?

Inselbuch - Cross/Speights

148

1 A I don't know what you mean by the deal.

2 MR. LOCKWOOD: Objection. What do you mean --

3 A If you mean the discussions that led to the original term
4 sheet --

5 Q Yes, sir.

6 A Yes, Mr. Shelnitz was there. So was I.

7 Q Would you agree with me that from the PI committee's
8 perspective, as a plan proponent, that the PI committee as far
9 as treatment of traditional PD claims is concerned, had the
10 position that none of that money should come out of your hide?

11 That is, the PI constituency hide?

12 MR. BERNICK: I'm going to object to that question,
13 Your Honor. That calls for the course of the negotiations
14 leading up to the term sheet and that is a privileged area and
15 should not be the subject of inquiry in this court beyond the
16 general process that's involved. The subject position should
17 not be subject to inquiry here.

18 THE COURT: What's the relevance of what the
19 committee's position is anyway?

20 MR. SPEIGHTS: Well, the committee is one of the plan
21 proponents.

22 THE COURT: Yes.

23 MR. SPEIGHTS: I might say that Mr. Inselbuch -- I
24 believe he answered it then but he answered the same question
25 at deposition. But that's as far as --

1 MR. LOCKWOOD: Your Honor, the fact that something is
2 answered at deposition doesn't mean it's admissible in a trial.

3 THE COURT: That's so but let Mr. Speights make his
4 point, please.

5 MR. SPEIGHTS: The answer -- the question is whether
6 a plan proponent -- what its position was on this plan, and I'm
7 trying to establish which I probably could do in two minutes,
8 that the PI committee's position -- that is, the plan proponent
9 -- is that it has no interest whatsoever in how traditional PD
10 claims are dealt with. That comes out of the hide of equity
11 and the PI committee so that my dispute on behalf of Anderson
12 is not with Mr. Inselbuch or his committee or Mr. Frankel or
13 his future claimants representatives. The issue in dispute
14 about the treatment of Anderson is with equity and Mr.
15 Bernick's client.

16 MR. BERNICK: Your Honor, I think that as a proration
17 from Mr. Speights -- I know that he said this in his papers --
18 it's not proper here and it's entirely irrelevant. The
19 question is the plan of reorganization that's before the Court.
20 We are not negotiating in this case in this courtroom
21 proceeding. We're just dealing with the plan that's been
22 agreed and all the plan proponents support it. So, whatever
23 Mr. Speights might think of its being the underlying
24 negotiation practice or what drove it or economics is entirely
25 irrelevant and it's privileged, privileged under Rule 408.

1 THE COURT: Well, I think the problem is that you
2 need to substantiate at least at what point in time all of this
3 is happening because, as I understand it, the debtor's assets
4 are the debtor's assets and they're going to be divided up
5 among some group. So, I don't quite understand the point. To
6 the extent that there's an objection to the distribution of
7 assets, all parties are affected by the distribution of assets.
8 So, I think I need to sustain the objection but I'll give you a
9 chance to respond.

10 MR. SPEIGHTS: Well, Your Honor, let me just --
11 earlier when I wanted to offer Exhibit 40, I said something to
12 the same effect, and I said I would come back to it. Anderson
13 has a number of objections to the plan. We're up here now
14 almost on a cameo basis because Mr. Inselbuch is here. We
15 haven't seen the whole case presented by the debtors as to
16 Anderson and so my cross examination is a little bit
17 herky-jerky because we are just sitting over here to
18 accommodate Mr. Inselbuch which I'm more than happy to do.

19 But, among our many objections to the plan are, first
20 of all, we assert that the plan was or is presently being
21 asserted in bad faith or not being asserted in good faith in
22 accordance with the Bankruptcy Code. We also challenge
23 feasibility. We have a number of objections on that. So, I'm
24 trying to get through Mr. Inselbuch, as one of the plan
25 proponents, to show that Mr. Inselbuch and his committee,

1 number one, have negotiated a plan in which they had left it
2 entirely to the debtors to decide how traditional PD claims are
3 treated under this plan. It all goes back to W.R. Grace and
4 what it wants with respect to traditional PD claims in general
5 and with Mr. Speights and Anderson Memorial Hospital in
6 particular.

7 For that reason, I'm trying to show the circumstances
8 of how this deal is being proposed to Your Honor and that's a
9 big jigsaw puzzle and only two or three pieces am I trying to
10 get out of Mr. Inselbuch.

11 At the same time, Your Honor, I think it's relevant
12 through good faith objections to show that the origin of the
13 dispute in Celotex, number one, which is reflected in this
14 order that I will be able to show, I believe, the PI TAC was
15 intimately involved in -- in fact, they're named parties in
16 this order -- which resolved Anderson's claim down in Tampa,
17 Florida. The bankruptcy which Mr. Bernick has frequently
18 referred to in this case as being where some war broke out. To
19 place that in context and to show by this order which was
20 produced in a proceeding involving the PI TAC, shows that
21 Anderson's claims were allowed in a certain sum there, through
22 a process which goes directly to the issue of feasibility,
23 because if you take the 52 allowed claims in this order which
24 is a 12 percent plan but take the full amount, what we will be
25 able to show, I believe, is that the average amount per

1 building for Anderson claims is \$5 million per building which
2 comes up to be a very large sum which has effect on feasibility
3 in this plan.

4 I'm not sure I've covered every ground. I'm just
5 trying to lay the groundwork now with Mr. Inselbuch that this
6 is what happened in Celotex and their deal that they're
7 supporting in this plan leaves it to the debtor to decide and
8 the PI and future claimant's representatives have no interest,
9 I believe, in whether Anderson goes back to the tort system or
10 whether Anderson is decided by Your Honor, et cetera, et
11 cetera. Now I've made my showing at your request.

12 MR. BERNICK: Your Honor, if we're going to go
13 through that in connection with anybody who wants to make a
14 proffer of why something is relevant, we're really not going to
15 get out of here, and I think that now having heard the proffer
16 over, that really the common theme for everything Mr. Speights
17 wants to do is to talk about what happened in prior cases and
18 then why the negotiation, at least as he views it through his
19 perspective of this case, is different. We feel very strongly
20 that the history of negotiations substantively leading to this
21 plan should be off limits, and Your Honor has ruled that that
22 was appropriate in connection with the depositions that have
23 been taken of the Grace witnesses.

24 It is improper in a court of law to talk about
25 privileged settlement matters and that's exactly what it is

1 that Mr. Speights is doing. It is entirely irrelevant to the
2 standard of good faith, it's entirely irrelevant to this
3 proceeding, and is corrosive of the integrity of the
4 negotiation process. And we strenuously take issue with the
5 idea that we should be dealing with these matters in this
6 proceeding.

7 THE COURT: Okay. Well, I don't see the relevance of
8 what happened in Celotex, because to the extent that there was
9 an allowance of a claim in Celotex, that should have been, I
10 would assume, Celotex's liability for whatever occurred in that
11 case not Grace's. And to the extent that Grace has or doesn't
12 have some liability, that's going to have to be determined in a
13 different place, regardless of where. It's not Celotex's
14 liability that's at issue, it's Grace's.

15 So, I don't see that the proffer establishes the fact
16 that this plan would be infeasible simply because the claims
17 that were allowed in Celotex were on average \$5 million each,
18 even though there were 52 of them. So, the objection is
19 sustained.

20 BY MR. SPEIGHTS:

21 Q Mr. Inselbuch, let me ask you, unless I'm violating some
22 confidentiality order which I'm sure the plan proponents will
23 be alert to raise, let me show you Plan Proponent's Exhibit 344
24 which is a term sheet which was e-mailed to me, I think over
25 the weekend by Kirkland & Ellis.

Inselbuch - Cross/Speights

154

1 MR. BERNICK: Before you -- why is it being shown?

2 Could you take it off the -- he said it might be confidential.

3 MR. SPEIGHTS: I don't know that it is but --

4 MR. BERNICK: 344. We're looking at --

5 MR. SPEIGHTS: It was at one time.

6 (Pause)

7 MR. BERNICK: No, this is not confidential.

8 THE COURT: Mr. Speights, is it three three four or
9 three four four?

10 MR. SPEIGHTS: Three four four.

11 THE COURT: Thank you.

12 MR. BERNICK: This is actually an attachment to an
13 exhibit that we have because the exhibit is an e-mail relating
14 to the litigation with the lenders. It's an e-mail from Mr.
15 Shelnitz to Ms. Krieger and Mr. Kruger and Mr. Pasquale. We
16 don't have an objection to its use by Mr. Speights.

17 MR. SPEIGHTS: Thank you. I'm going to put it on the
18 ELMO. Can you see the ELMO up there?

19 THE WITNESS: I have my own ELMO.

20 MR. SPEIGHTS: Oh, okay.

21 THE COURT: As soon as we get them turned on, Mr.
22 Speights.

23 Q Now, first of all, I guess in fairness to you, Mr.
24 Inselbuch, I show you the cover email from Mr. Shelnitz early -
25 -

1 COURT CLERK: You have to get closer to the
2 microphone?

3 MR. SPEIGHTS: I'm sorry.

4 Q I'm showing you first the cover e-mail from Mr. Shelnitz
5 forwarding the document in question. I don't want to ask you
6 anything about it but, in fairness, I want you to know the
7 source of it. And then the next page, if you've seen that, I'm
8 going to turn, is a term sheet for resolution of asbestos
9 personal injury claims. Now, is it correct that the asbestos
10 personal injury committee negotiated a term sheet with the
11 debtors and others to resolve this bankruptcy?

12 A Yes.

13 Q I want to turn your attention to a paragraph dealing with
14 traditional PD claims which is at the bottom of Page 3.

15 A Well, before you do that, this cover note says that this
16 is draft of the term sheet.

17 Q I understand.

18 A I don't know whether this document is the same form as the
19 term sheet which was actually executed.

20 Q I appreciate that and I'm going to Paragraph B9 on Page 3
21 and I'm going to ask you that exact question. Paragraph --

22 A I can't answer that question.

23 Q Well, I hadn't asked it yet.

24 A You said that was the exact question. I thought I knew
25 what it was.

Inselbuch - Cross/Speights

156

1 Q Well, I withdraw my exact question and ask this question.

2 (Laughter)

3 Q You see the portion there, Traditional Asbestos Property
4 Damage Claims?

5 A I see that.

6 Q And you see the Treatment of Traditional Property Damage
7 Claims?

8 A I see that.

9 Q And, to your knowledge, has that provision of the term
10 sheet been changed?

11 A I don't know.

12 Q I'm asking you to assume that that is the same provision
13 in the plan of reorganization as it exists today. Can we
14 assume that, Mr. Inselbuch?

15 A Yes, you can assume anything you want.

16 Q All right, sir. Now, if that is the same plan provision
17 that exists today, would you agree with me that that provision
18 does not provide how the debtors or anyone else should decide
19 whether PD claims, traditional PD claims, are allowed or
20 disallowed?

21 MR. LOCKWOOD: Your Honor, I object to the premise
22 that if that plan provision is the same today -- this is a term
23 sheet. It's been superseded by the plan. The plan, to my
24 knowledge, does not have that particular provision as such in
25 it. But, in any event, if it does, the plan is the place to

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Inselbuch - Cross/Speights

157

1 refer the witness to, not the term sheet.

2 A It's a draft term sheet.

3 MR. SPEIGHTS: I'll rephrase the question. I'll
4 rephrase the question.

5 Q Under this term sheet, understanding that it's not the
6 final term sheet, under this term sheet, is it correct that
7 there is no provision about how traditional PD claims should be
8 allowed or disallowed?

9 MR. GUY: Objection, Your Honor. I don't know
10 whether this is the final term sheet or not but, as Mr.
11 Lockwood just said, all that's relevant here is what the plan
12 says today, not what a prior term sheet said.

13 THE COURT: It seems to me that what is relevant is
14 the plan, Mr. Speights. I'm giving you some leeway because
15 you've got this objection that indicates that there is
16 something about the plan proposition before the Court that's
17 not in good faith. So, I'm assuming that this is going to that
18 issue?

19 MR. SPEIGHTS: It is.

20 THE COURT: All right.

21 MR. SPEIGHTS: Among others, Your Honor.

22 THE COURT: All right. Well, I'll give you some
23 relevance -- or some leeway, pardon me, but I will accept this
24 evidence subject to a relevance objection later.

25 MR. SPEIGHTS: Thank you, Your Honor.

1 THE COURT: Relevance, pardon me, determination
2 later.

3 A What this Paragraph 9 says is, "The plan shall set forth
4 procedures for the allowance of all asbestos PD claims." So,
5 yeah, it doesn't provide the procedures in the term sheet. No
6 procedure is generally provided in the term sheet.

7 Q Would it be fair to -- strike that. Has the PI committee
8 taken a position on how traditional PD claims should be allowed
9 or disallowed?

10 MR. LOCKWOOD: Objection to form. Taken a position
11 where, how?

12 THE COURT: All right. Do you want to limit the
13 question, Mr. Speights?

14 Q I understand the plan now provides that traditional PD
15 claims, present traditional PD claims, will be decided by the
16 bankruptcy court. Is that your understanding?

17 A I really don't know, Mr. Speights.

18 Q Well, has the PI committee taken a position as to whether
19 that is the appropriate way to deal with traditional PD claims,
20 present traditional PD claims?

21 MR. LOCKWOOD: Same objection.

22 THE COURT: I'm going to overrule it. To the extent
23 the witness can answer it, he'll answer it.

24 A The asbestos creditors committee supports the plan of
25 reorganization plus it supports the treatment that the plan

Inselbuch - Cross/Speights

159

1 provides for PD claimants. I am not sufficiently erudite to
2 recite on what that treatment is.

3 Q Well, I go back to my other question, Mr. Inselbuch, and
4 don't answer it until your lawyer can object. Haven't you
5 already --

6 A I hardly need the instruction.

7 Q Aren't you already of the view that the PI committee does
8 not care how PD claims are treated, traditional PD claims,
9 other than not wanting the money to come out of the hide of the
10 PI claimants?

11 MR. LOCKWOOD: Objection.

12 THE COURT: I'm overruling it subject to deciding the
13 relevance later. If you can answer, Mr. Inselbuch?

14 A The interest of the PI -- what you call the PI committee,
15 the asbestos creditors committee, in the treatment by the plan
16 of the claims of other than personal injury claimants, is that
17 they be treated in the way that will satisfy the Court that the
18 plan can be confirmed.

19 MR. SPEIGHTS: One moment, Your Honor.

20 (Pause)

21 Q Would it be fair to say that if the Court decided to
22 permit Anderson to return to the tort system, it would not
23 violate the term sheet that the PI committee negotiated with
24 the debtors in equity?

25 MR. BERNICK: Objection. Calls for a legal

Inselbuch - Cross/Speights

160

1 conclusion and it's also entirely irrelevant to the plan of
2 reorganization.

3 THE COURT: I'm not sure what the point is that
4 you're driving at. It doesn't seem relevant, Mr. Speights, but
5 if you can substantiate what the relevance is?

6 MR. SPEIGHTS: How about if I tell that's my last
7 question, Judge?

8 (Laughter)

9 THE COURT: All right. The objection is sustained.

10 (Laughter)

11 MR. SPEIGHTS: Your Honor, I go back to what I've
12 been trying to say and I think you granted me leeway to show
13 that. The PI committee is a plan proponent which negotiated a
14 deal, was instrumental in negotiating that deal, especially
15 through Mr. Rice and Mr. Weschler and the plan proponents, and
16 that the deal they negotiated dealt with traditional PD claims
17 such as Anderson and that under the deal that they negotiated,
18 there is no requirement that Anderson be tried by the
19 bankruptcy court as opposed to being returned to the tort
20 system. That's all I'm trying to establish, Your Honor, on
21 this question.

22 THE COURT: So, you want to get behind the plan to
23 the negotiations to see whether the negotiations themselves
24 required the plan treatment?

25 MR. SPEIGHTS: I'm trying to get to the deal itself

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1 negotiated by Mr. Elihu's [sic] committee. The deal does not
2 require Anderson to stay in the bankruptcy court.

3 MR. LOCKWOOD: Objection, Your Honor.

4 MR. SPEIGHTS: The plan procedures that were later
5 negotiated and which are being proposed here which I don't
6 think was being pushed by the PI committee requires that. I'm
7 trying to draw that distinction and I'm not trying to sabotage
8 the deal that was negotiated on this objection. I'm trying to
9 show that this was not part of the deal that was negotiated.
10 This is something else that's come along later.

11 THE COURT: All right. So the point that you're
12 trying to make is that the plan is not the deal?

13 MR. SPEIGHTS: The plan is not the deal that was
14 negotiated and announced as a part of the term sheet.

15 MR. BERNICK: Your Honor, it is true that the term
16 sheet --

17 MR. SPEIGHTS: If I could finish one thing?

18 MR. BERNICK: I thought you were done.

19 MR. SPEIGHTS: I was but then I remembered something
20 else. It was not part of the term sheet that was negotiated
21 without question that, when it was turned over by the PI
22 committee and the future claimant's representative to the
23 debtors, it was turned over with the understanding that they
24 would deal with property damage claims which they have
25 proceeded to do and they have dealt with them this way. Now

1 I'm through, Mr. Bernick.

2 MR. BERNICK: Yeah. That's a very interesting story
3 that Mr. Speights is speculating and inferring. It is a story
4 that has nothing to do with matters that are, (a) either
5 discoverable or (b) admissible. The objective fact and the
6 only relevant fact is that the procedures that he's focused on
7 were, in fact, negotiated subsequently. They were negotiated
8 at the time that we had a futures representative for the PD
9 committee.

10 And as Mr. Speights knows, because he was present
11 during some of the discussions that led finally to the plan as
12 it is today, both the future claimant's representative and the
13 PD committee were involved in those discussions. They resulted
14 in a separate treatment with respect to the PD claimants and,
15 in that treatment, procedures through a CMO that would apply to
16 claims that had not yet been resolved. And that's all in the
17 plan.

18 THE COURT: All right.

19 MR. BERNICK: So, all the stuff about what happened
20 at the time of the term sheet may be of interest as a
21 historical matter to Mr. Speights, but it's not germane to the
22 plan that's before the Court and it gets into matters that are
23 not properly admissible.

24 MR. SPEIGHTS: Your Honor, before you rule, I want to
25 say that I strongly disagree with Mr. Bernick's revised

Inselbuch - Cross/Speights

163

1 history. However, we're just here today on one issue. This is
2 not Anderson's day. I understand that but I want the record to
3 reflect that I strongly disagree with his --

4 MR. BERNICK: It is Anderson's day with Mr. Inselbuch
5 on this issue.

6 THE COURT: All right. I said that I would accept as
7 evidence subject to some relevance and, in fact, if it gets
8 into confidential settlement discussions, I will strike it
9 immediately because I don't think that's proper under the Rules
10 of Evidence. But, to the extent that Mr. Inselbuch can answer
11 the question, I'm going to permit him to answer the question
12 subject to a relevance objection. So, Mr. Inselbuch --

13 MR. LOCKWOOD: Your Honor, I just have one additional
14 objection to form which is that he's talking about the deal and
15 the implication is that the deal is embodied in the term sheet
16 and not in the plan and it seems to me that --

17 THE COURT: Well, the term sheet says that the plan
18 is going to set up the procedures. I mean, that's what the
19 term sheet says.

20 MR. LOCKWOOD: Well, that's true.

21 THE COURT: You may ask your question, if you would
22 restate it, because I've lost it, Mr. Speights. For my
23 benefit, please?

24 BY MR. SPEIGHTS:

25 Q Mr. Inselbuch, I think the question was, and I'll restate

Inselbuch - Cross/Speights

164

1 it, that the deal -- that is, the term sheet as opposed to the
2 final plan of reorganization -- the term sheet does not require
3 as a part of that term sheet present PD claimants to be tried
4 by the bankruptcy court? Isn't that correct?

5 A The term sheet provides that the plan will provide a
6 procedure for liquidating the PD claims. It does not, in the
7 term sheet, provide any procedure for doing that.

8 Q And isn't it also correct, Mr. Inselbuch, that the PI
9 committee was not involved in negotiating those procedures
10 after the term sheet was executed?

11 MR. BERNICK: I'm going to object and I would caution
12 -- I believe that that question asks for particulars about how
13 the negotiations actually proceeded. I also believe it's wrong
14 because in part because it's overly broad but this is precisely
15 the kind of thing that Rule 408 is designed to foreclose.

16 THE COURT: All right. Well, I think whether or not
17 the committee participated as a yes or no answer does not get
18 into settlement discussions and terms so I think the objection
19 is overruled on that basis. But it's a yes or no answer.

20 MR. BERNICK: Well, also, then, just to be clear, the
21 discussions that resulted finally in the plan were discussions
22 that included not only preliminary discussions but the actual
23 formulation of the plan itself and Mr. Speights's question as
24 it's framed now really asks whether the PI committee played no
25 role through counsel in the actual crafting of the plan,

Inselbuch - Cross/Speights

165

1 including those provisions that related to PD.

2 THE COURT: Then Mr. Inselbuch can answer that
3 question.

4 A If I understand the question, the Committee, the Asbestos
5 Creditors Committee, through counsel, participated in some
6 detail in the negotiation and drafting of what is now the plan
7 of reorganization and most of its provisions. Many of the
8 subsets of those term -- of those plan provisions, the
9 negotiating of those subsets were assigned to particular
10 members of the group of plan proponents. And as far as I
11 recall, the Asbestos Creditors Committee did not play an active
12 role in negotiating with you or any other PD Claimant
13 representatives of the procedures that exist in the plan.

14 MR. SPEIGHTS: That's all I have, Your Honor, other
15 than to say I believe the end of Mr. Inselbuch's answer
16 responded to my question which was about negotiations, the rest
17 was in response to Mr. Bernick's question, but he did answer
18 the question about negotiations. Thank you, very much, Your
19 Honor.

20 THE COURT: All right. Anyone else on cross exam?

21 (No verbal response)

22 THE COURT: All right. Redirect. I should say also
23 in case in chief because I understand that some of this had to
24 do with the questioner's case in chief. But in any event, Mr.
25 Lockwood, your turn.

1 REDIRECT EXAMINATION

2 BY MR. LOCKWOOD:

3 Q I have basically two topics and maybe even just two
4 questions that I'd like to address to you, Mr. Inselbuch.
5 First -- and I apologize if I didn't -- my notes didn't get
6 this accurately. I believe you were asked by counsel for
7 Garlock whether or not the TAC had the right to consent to the
8 compensation of the trustees in the Grace Trust Agreement and I
9 think you said yes -- compensation increases. I think you said
10 yes. I may be wrong about that. But what I'd like you to do
11 is to look at Section 4.5 of the trust Agreement and tell the
12 Court exactly what the respective role of the trustees and the
13 TAC are in dealing with annual compensation increases for
14 trustees.

15 THE COURT: And this is 277.02, the Trust Agreement?

16 MR. LOCKWOOD: Yes, Your Honor, it is.

17 THE COURT: All right.

18 A What section was that, Peter?

19 Q 4.5.

20 A Well the relevant sentence, if I just read it out of the
21 document --

22 Q However you feel like you can best answer it.

23 A "Per annum retainer and hourly compensation payable to the
24 trustees hereunder shall be reviewed every year by the trustees
25 and after consultation with the members of the TAC and the

Inselbuch - Redirect/Lockwood

167

1 Futures Representative, appropriately adjusted by the trustees
2 for changes in the cost of living."

3 Q So that's a consultation right on the part of the TAC and
4 not a consent right?

5 A Yes, I misspoke.

6 Q My second question is this, you had a lengthy exchange
7 with counsel for Garlock about determining the liability of
8 Grace in the tort system and the procedures for that, and I
9 don't want to try and paraphrase it, but you remember generally
10 that exchange of questions and answers?

11 A That was this morning so I do remember it.

12 Q Are there jurisdictions to your knowledge where a
13 co-defendant such as Garlock can obtain a determination of the
14 liability of Grace or the Grace Trust in a tort suit without
15 having to implead the Trust as a defendant?

16 A Yes. There are some jurisdictions at least that will
17 permit the identification of bankrupts or bankrupt joint
18 tort-feasors on the jury verdict form so that the jury can
19 allocate fault. That may be the operative tort law concept to
20 the bankrupts.

21 Q And could you give us an example or examples of such
22 jurisdictions?

23 A At last look I think New York does that.

24 Q So it's then a matter of state tort law as to whether or
25 not setoff or credit rights can be litigated against absent

Inselbuch - Redirect/Lockwood

168

1 defendants by co-defendants?

2 A Well that's true, but what I'm talking about had not to do
3 with setoffs. What I'm talking about is the opportunity that
4 the Garlock lawyers seem to be so worried about, about
5 determining the respective fault of the various co-defendants
6 in the same proceeding. That's different from the question of
7 whether there would be a setoff permitted to one or another of
8 the co-defendants as a result of that.

9 There are also jurisdictions where joint and several
10 liability doesn't lie against the defendant unless it is
11 allocated some threshold amount of the relative fault of the
12 case. So there it would also be important. And in New York to
13 that extent, having them on the verdict form, permits for that
14 to happen in the same proceeding. Setoffs are different.
15 Setoffs only occur when somebody settles, whether with a trust
16 or with another co-defendant.

17 MR. LOCKWOOD: No further questions, Your Honor.

18 THE COURT: Recross.

19 MR. GIANNOTTO: I just have a very quick question
20 just to clear up the record. This is Michael Giannotto.

21 RECROSS EXAMINATION

22 BY MR. GIANNOTTO:

23 Q Mr. Lockwood referred you to a provision in the Trust
24 Agreement about whether it was a concurrence or a consent role
25 by the TAC in terms of the trustee's compensation, do you

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Inselbuch - Recross/Giannotto

169

1 recall that?

2 MR. LOCKWOOD: Objection. He says concurrence or
3 consent. The question was consultation or consent.

4 Q Consultation or consent.

5 A You mean the question he just asked me?

6 Q Yeah.

7 A Yes, I remember that, too.

8 Q Okay. Could you turn to the Trust Agreement at Section
9 2.2(f) Romanette (ix) which is on Page 11.

10 A Yes, sir.

11 Q And if you could just read that to yourself, please,
12 subsection 9.

13 A Which subdivision?

14 Q Subdivision 9, Roman Numeral IX.

15 A Right.

16 Q Okay.

17 A I was right.

18 Q Right, you were right the first time that's what I wanted
19 to make clear, that to change the compensation other than to
20 reflect cost of living increases of the trustees you need the
21 TAC's consent --

22 MR. LOCKWOOD: Objection.

23 Q -- unless the Bankruptcy Court approves it?

24 MR. LOCKWOOD: Objection, he didn't --

25 A TAC and future claimants representative.

Inselbuch - Recross/Giannotto

170

1 THE COURT: Wait. I'm sorry, I got left out of that
2 loop, Mr. Lockwood.

3 MR. LOCKWOOD: Well, he left out part of what he was
4 reading from the section. It says --

5 | A Why don't I just read the sentence.

6 || Q Why don't you do that.

7 A "To change the compensation and/or per diem of the members
8 of the TAC, the Futures Representative, the Delaware Trustee or
9 the Trustees, other than to reflect cost of living increases or
10 changes approved by the Bankruptcy Court as otherwise provided
11 herein. That's a listing of something that would require the
12 consent of the TAC and the Futures Representative."

13 Q Thank you, very much, Mr. Inselbuch.

14 A "Subject to appeals and ultimately a decision by the
15 Bankruptcy Court."

16 MR. GIANNOTTO: Thank you, very much.

17 THE COURT: Anyone else on recross?

18 (No verbal response)

19 THE COURT: Mr. Lockwood, anything further from you?

20 MR. LOCKWOOD: No, Your Honor.

21 THE COURT: You're excused, Mr. Inselbuch. Thank
22 you.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: Mr. Lockwood, any further witnesses?

25 MR. LOCKWOOD: I believe the debtors are putting on

Finke - Direct/Esayian

171

1 the next witness, Your Honor.

2 THE COURT: Ms. Esayian.

3 MS. ESAYIAN: Your Honor, Lisa Esayian for the
4 debtors. Our next witness is Richard Finke from W.R. Grace.
5 And, Your Honor, we do not have a binder for Mr. Finke because
6 it's a relatively brief examination. We just have a few
7 demonstrative exhibits. I don't know if Your Honor has a copy.
8 If not I will hand you -- if I may approach I'll hand you an
9 extra copy.

10 THE COURT: Yes. Thank you. Wait one second, Jan.
11 Thank you. All right, if you'd swear Mr. Finke, please.

12 RICHARD C. FINKE, DEBTOR'S WITNESS, SWORN
13 DIRECT EXAMINATION

14 BY MS. ESAYIAN:

15 Q Good afternoon, Mr. Finke.

16 A Good afternoon.

17 Q Could you state your full name for the Court and the
18 record, please?

19 A Yes. Richard C. Finke.

20 Q By whom are you employed?

21 A W.R. Grace and Company.

22 Q For how long have you worked for W.R. Grace?

23 A For a little over 20 years.

24 Q Could you give the Court a very brief overview of your
25 educational background and employment with Grace?

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Finke - Direct/Esayian

172

1 A Yes. I received a B.A. from Case Western Reserve
2 University in 1976, a J.D. from Duke University School of Law
3 in 1979 and I worked for ten years for a New York law firm
4 Cadwalader, Wickersham & Taft doing general litigation and then
5 I joined W.R. Grace in February of 1989.

6 Q In general terms what have been your duties with W.R.
7 Grace since February of 1989?

8 A Pre-petition, my duties principally involved case
9 management and oversight of asbestos property damage
10 litigation. That included support of outside counsel,
11 development and preparation of expert witnesses and you know,
12 similar tasks.

13 Q And how about post-petition, has that changed in some way?

14 A Initially it was limited to property damage aspects of the
15 Chapter 11 cases including review of the approximately 4,000
16 property damages claims that were filed by the bar date. That
17 changed in -- during the summer of 2004. At that time I was
18 asked by our then CEO Paul Norris and our then General Counsel
19 David Siegel to take on responsibility for the general in-house
20 management and oversight of the development of a plan of
21 reorganization. And those responsibilities have continued till
22 today and they include review and commenting and editing of the
23 plan sections, disclosure statement sections and related plan
24 exhibits, coordinating in-house counsel and other personnel in
25 terms of seeing to it that the appropriate in-house people

Finke - Direct/Esayian

173

1 reviewed and commented on pertinent sections of the plan and
2 the disclosure statement and plan exhibits. The
3 responsibilities also include communicating with management
4 concerning plan developments and issues and attending numerous
5 strategy sessions and discussions.

6 Q So would it be fair to say that you have been closely
7 involved in your in-house general oversight roles with the
8 development of the proposed plan that is before the Court
9 today?

10 A Yes.

11 Q Now, Mr. Finke, in your role with respect to assisting
12 with the development of the proposed plan, I'm going to ask you
13 some questions about certain specific provisions of the plan
14 and the first provision I'm going to ask about is Section 8.8.7
15 which includes certain releases. And I believe you have in
16 front of you a copy of this demonstrative exhibit which shows
17 the best -- a large portion of Section 8.8.7.

18 First of all, Mr. Finke, have you reviewed this
19 provision previously?

20 A Yes, I have.

21 Q And are you familiar with it?

22 A Yes, I am.

23 Q What is the purpose of Section 8.8.7?

24 A The purpose is without, you know, reading, you know,
25 through this verbiage is essentially to release the enumerated

Finke - Direct/Esayian

174

1 parties in this section and their representatives to the extent
2 they served during the Chapter 11 cases from any claim held by
3 a holder of a claim in the Chapter 11 cases or the holder of an
4 equity interest from any claims pertaining to the debtors or
5 the reorganized debtors or their businesses or these Chapter 11
6 cases.

7 Q Has this section 8.8.7 recently been modified?

8 A Yes, it was.

9 Q And how did those modifications come about?

10 A This was -- the recent modification was in response to an
11 objection by the U.S. Trustee. He objected to the scope of the
12 releases to the extent that they -- that the section could be
13 read to release claims of representatives who have not been at
14 all involved in the Chapter 11 cases. And so the additional
15 language which is highlighted in yellow I believe was added to
16 narrow the scope.

17 Q And would that be the -- could you just read the
18 additional language that was added in response to the U.S.
19 Trustee objection?

20 A Yes. "To the extent such representatives served during
21 the Chapter 11 cases."

22 Q And why -- as a general matter why did Grace -- why has
23 Grace and the plan proponents included this Section 8.8.7 in
24 the proposed plan?

25 A There are several reasons. One reason is to protect the

Finke - Direct/Esayian

175

1 debtors' and reorganized debtors' assets. Some of the parties
2 listed and released pursuant to this section have
3 indemnification rights over against Grace for claims that might
4 otherwise be discharged or enjoined as against the debtors and
5 reorganized debtors. So we felt it was important to include
6 this release provision to prevent a sort of backdoor liability
7 situation from arising.

8 We were also advised by outside counsel that such
9 provisions are -- I believe the word was ubiquitous in plan
10 reorganizations -- plans of reorganization and that therefore
11 parties participating in these Chapter 11 cases would expect
12 that such a release provision would be included

13 And finally, we also came to believe that this
14 provision should be included to encourage those who are
15 participating in the Chapter 11 cases and their
16 representatives, to encourage a unfettered and vigorous
17 participation, not only just from Grace's standpoint, which
18 would involve Grace's own representatives operating our
19 businesses and representing the company, but also to encourage
20 other participants and creditors to negotiate settlements of
21 claims and to, you know, participate in the formulation of the
22 plan.

23 Q Now, Mr. Finke, Section 8.8.7 covers only certain
24 specifically listed parties, committees and their
25 representatives. Why are those particular entities and parties

Finke - Direct/Esayian

176

1 covered by this release provision?

2 A Well, some have -- as I indicated, some have an identity
3 of interest with the debtors which are reflected in
4 indemnification rights over against the debtors, others have
5 made a substantial contribution to the plan both financial and
6 otherwise.

7 Q In the course of mailing out the plan and disclosure
8 statement for the voting process, do you know if creditors were
9 informed of this release?

10 A Yes, they were. In the voting instructions that
11 accompanied ballots that were sent to creditors eligible to
12 vote on the plan, the voting instructions clearly stated that
13 this Section 8.8.7 would be included in the plan and that a
14 vote in favor of the plan would be deemed to release claims as
15 explained in this provision against the enumerated parties.
16 And that language was set out in boldface type in a separate
17 box in the voting instructions.

18 THE COURT: Ms. Esayian, I don't think we got the
19 exhibit number for the demonstrative for 8.8.7 on record.

20 MS. ESAYIAN: You're correct, Your Honor. I
21 apologize. That was Plan Proponent's 505-1.

22 THE COURT: All right.

23 Q And, Mr. Finke, I have now -- could you now take a look at
24 Plan Proponent's 505-4, and is that the page from the cover
25 letter that was included with the ballot, the cover letter that

1 had the voting instructions and that includes in a box in bold
2 the notification to the creditors of this release provision,
3 Section 8.8.7?

4 A Yes, it is, although I don't believe in the -- at least I
5 don't recall that the voting instructions had the title of the
6 box highlighted in gold or yellow.

7 A So for demonstrative purposes we put the title in yellow,
8 but the actual version that was sent out was in bold, but not
9 in yellow, is that fair?

10 A Yes.

11 Q Now, is there any exception to what we've just described,
12 that creditors were informed of this release in the voting
13 instructions? Any exception in terms of a party that's covered
14 by the release provision?

15 A Yeah, there is an exception, parenthetical exception, in
16 Section 8.8.7. The exception relates to the fact that
17 representatives of the Sealed Air indemnified parties and the
18 Fresenius indemnified parties are released from these claims,
19 which notwithstanding the extent of I think their activity in
20 the cases I think that arises out of -- at least my
21 understanding is that that arises out of the Sealed Air and
22 Fresenius agreements.

23 Q All right. Now, Mr. Finke, I'd like to turn to another
24 release provision in the plan and that is Section 8.8.8. And I
25 believe you have in front of you Plan Proponent's Exhibit

Finke - Direct/Esayian

178

1 505-2. Have you seen this Provision 8.8.8 previously?

2 A Yes, I have.

3 Q And are you generally familiar with it?

4 A Yes, I am.

5 Q After the plan was mailed out for voting this past spring
6 were there any objections to this provision 8.8.8?

7 A I'm aware of one, again, by the U.S. Trustee similar to
8 the previous provision that we discussed. The U.S. Trustee
9 thought the terms of Section 8.8.8 were over broad and that
10 only the representatives of the debtors and nondebtor
11 affiliates that should be released are those that served during
12 the Chapter 11 cases and so that modification was made to this
13 section.

14 Q All right. And so that modification was made recently to
15 this section as reflected in Plan Proponent's 505-2?

16 A Yes, in the highlighted language.

17 Q Mr. Finke, in Grace's business judgment is this -- why is
18 this release appropriate and necessary for the proposed plan of
19 reorganization?

20 A Grace made the determination as an exercise of its
21 business judgment that the benefits arising from releasing its
22 own representatives from their actions and conduct during the
23 course of the Chapter 11 as it relates to, you know, the
24 debtors and these cases, greatly outweighed the potential
25 costs, distractions, delays and potential negative impact on

Finke - Direct/Esayian

179

1 employee morale that might arise from the company's pursuing
2 claims against its representatives.

3 Q Were these -- the employees you're referring to, were
4 these employees who were actively involved in running Grace
5 businesses and operations?

6 A Certainly they are included, yes.

7 Q And did Grace actually do some evaluation of the costs and
8 benefits and make a decision as to whether it was appropriate
9 to release these claims?

10 A Yes, in terms of considering the pros and cons of
11 including a provision like this in the plan, it was felt that
12 it was more important to include this Section 8.8.8 both as a
13 reward for individuals who stayed with the company through the
14 quite protracted and uncertain Chapter 11 cases that the
15 debtors are in and also it was -- there was a concern that even
16 assuming it had a substantial claim against a representative
17 that pursuing such claims would be contrary to one of the
18 principal objectives that Grace had in entering Chapter 11 in
19 the first place, which was to try to put behind it to the
20 fullest extent possible and feasible, all claims, disputes and
21 litigation and come out of Chapter 11 with a fresh start. And
22 by pursuing any claims against its own representatives, that
23 would just send the wrong message to the rest of the workforce
24 and perhaps entangle it in matters that it really wanted to put
25 behind it.

Finke - Direct/Esayian

180

1 Q In addition to the releases in 8.8.8 being appropriate in
2 Grace's judgment for those reasons, does Grace have a view as
3 to whether the releases are also necessary in the context of
4 the overall settlements that are achieved by the plan?

5 A Yes. I mean that's kind of what I was trying to say, you
6 know, as part of this fresh start that the company is looking
7 for, that its releases of this nature are viewed as sort of an
8 integral piece of a bigger puzzle which is represented by the
9 plan.

10 Q All right. Now I'd like to ask you about just one more
11 plan provision and that is Section 11.9. And I believe you
12 have in front of you Plan Proponent's Exhibit 505-3. Mr.
13 Finke, have you seen and are you generally familiar with
14 Section 11.9?

15 A Yes, I am.

16 Q A similar question as to the other two provisions we've
17 looked at. Did the plan proponents recently modify Section
18 11.9?

19 A Yes, we did. Again, the U.S. Trustee asserted an
20 objection to the inclusion of certain entities and -- well
21 entities in the list of parties that would benefit from Section
22 11.9.

23 Q And is that modification and the deletion of those
24 entities reflected in the red strikeouts on 505-3?

25 A Yes, it is. The -- again, the Trustee raised its concern

Finke - Direct/Esayian

181

1 and belief that only parties who had been active during the
2 Chapter 11 cases should be eligible for releases from claims.
3 And since the entities in question, the two trusts, the
4 trustees and trust advisory committees, do not come into
5 existence until the effective date, he felt it was
6 inappropriate to have them included in this section so we have
7 deleted them.

8 Q And did that deletion fully resolve the U.S. Trustee's
9 objection with respect to Section 11.9?

10 A Yes, to my understanding he was satisfied and has
11 withdrawn his objection.

12 Q How about for the other two provisions we looked at, 8.8.7
13 and 8.8.8, did the modifications that you've described there
14 for those provisions fully resolve the U.S. Trustee's
15 objections to those provisions?

16 A It is my understanding that they did, yes.

17 Q Mr. Finke, in general what is the purpose of Section 11.9?

18 A Section 11.9 seeks to provide, in essence, immunity from
19 liability with -- to the enumerated parties for any and all
20 acts and omissions in connection with or arising out of the
21 Chapter 11 cases as is set forth in the section. The purpose
22 of the provision, you know, we felt strongly that anyone, any
23 party who participated in the process of seeking negotiated
24 settlements of claims and of trying to pull a consensual plan
25 together and of making substantial contributions to integral

Finke - Direct/Esayian

182

1 components of that plan should not -- or should be allowed to
2 do so without concern that subsequent to the Chapter 11 they
3 would be subjected to claims of misconduct or errors of
4 judgment or a similar type of claims. So we included this
5 provision which again, we were advised by outside counsel is a
6 typical part of plans of reorganization and are consistent with
7 Third Circuit Law.

8 Q Thank you. Now I'd just like to turn to one final topic
9 away from these plan provisions for a moment, Mr. Finke, and
10 ask you a few questions about contributions that Grace is
11 making to the Trust and in context with the proposed plan on
12 behalf of certain other parties. First of all, I want to ask
13 you, as a general matter, are you aware that Grace settled with
14 certain insurance companies prior to its Chapter 11 filing and
15 provided indemnity provisions to those insurance companies in
16 those settlement agreements?

17 A Yes, I am.

18 Q And again, as a general matter, are you aware of how the
19 plan deals with those indemnity provisions?

20 A I'm not sure I understand the question.

21 Q Maybe I can just simplify it a little bit. As a general
22 matter are you aware that the plan would give protection under
23 the channeling injunction, protection under Section 524(g) to
24 those settled insurers who have indemnities in their
25 pre-petition settlement agreements?

Finke - Direct/Esayian

183

1 A Yes. I mean, certainly the plan includes within the
2 definition of asbestos protected parties settled asbestos
3 insurance companies which, as I understand, include the
4 companies you are referring to that had pre-petition settlement
5 agreements with Grace and which included the indemnity
6 obligations.

7 Q All right. So then with respect to those insurance
8 companies that have those pre-petition settlement agreements
9 with Grace that include indemnities from Grace to the insurers,
10 are any contributions being made in the proposed plan to the
11 Trust on behalf of those settled pre-petition insurers?

12 A Yes. I mean Grace is making -- when Grace makes its
13 contribution to the 524(g) Trusts, it will do so at least in
14 part, on behalf of those settled asbestos insurance companies
15 which had pre-petition settlement agreements with Grace. We
16 believe that such contributions are consistent or we have been
17 advised that such contributions are consistent with Third
18 Circuit Law and we believe that they are essential to prevent
19 the type of backdoor liability I was referring to earlier by
20 which claims could be brought against settled insurance
21 companies and which, if not protected, could seek to be
22 satisfied through the debtors' or reorganized debtors' assets.

23 Q And in addition to the contributions that Grace is making
24 -- strike that. Is Grace also making contributions on behalf
25 of any other entities that are defined in the plan as asbestos

Finke - Direct/Esayian

184

1 protected parties?

2 A Yes. I mean, Grace is making contributions on behalf, of
3 course, itself, the debtors, the nondebtor affiliates, the
4 reorganized debtors, Montana vermiculite and the settled
5 asbestos insurance companies that I mentioned. Those
6 contributions do not include or are not being made on behalf of
7 either the Sealed Air indemnified parties or the Fresenius
8 indemnified parties or the insurance companies which have
9 reached settlements with Grace recently within the -- during
10 the pendency of the Chapter 11 cases.

11 Q And those insurance companies that have reached
12 settlements recently, is it your understanding that they are
13 putting in their own contributions?

14 A Yes, pursuant to the settlement agreements.

15 MS. ESAYIAN: Your Honor, I'd just like to move the
16 admission for demonstrative purposes of the four exhibits,
17 505-1, -2, -3 and -4.

18 THE COURT: Any objection?

19 MR. BROWN: Your Honor -- no objection, Your Honor,
20 but just note for the record that they are not complete.

21 THE COURT: They are not complete?

22 MR. BROWN: Right.

23 MS. ESAYIAN: That is correct, Your Honor. They are
24 in -- there are ellipses in some places indicating some text
25 that is not critical for today's arguments that have been

Finke - Direct/Esayian

185

1 removed, and the page that shows the page from the letter that
2 was included with the voting instructions is just one page from
3 that letter. One moment, Your Honor.

4 THE COURT: All right. Plan Exhibits 505-1, 2, 3 and
5 4 are admitted.

6 MR. COHN: Your Honor, I'm sorry, may we -- this is
7 Dan Cohn for the Libby claimants. May we have a moment to look
8 at those exhibits, please?

9 THE COURT: Oh, yes.

10 MS. ESAYIAN: Oh, I'm sorry. While he's looking at
11 them, Your Honor, may I amend the offer so that the exhibit
12 that is actually the page from the voting instructions, which
13 is 505-4, would be actually admitted into evidence not for
14 demonstrative purposes, but for evidentiary purposes and the
15 other ones would be admitted for demonstrative purposes.

16 MR. COHN: Your Honor, I've looked at the exhibits.
17 No objection from the Libby claimants.

18 THE COURT: Mr. Brown.

19 MR. BROWN: No objection, Your Honor.

20 THE COURT: All right, one second until I change my
21 note, please.

22 (Pause)

23 THE COURT: Okay, thank you.

24 Q Mr. Finke, just one final question regarding Plan
25 Provision 8.8.7. You talked a little bit about how Fresenius

Finke - Direct/Esayian

186

1 and Sealed Air were exceptions in that provision as noted in
2 the -- roughly in the middle of the provision. Is there also
3 -- are you aware that there's also a -- let me just read to you
4 a sentence from the end of the provision. It says, "In
5 addition to the foregoing, each holder of a claim or equity
6 interest who receives or retains any property under this plan
7 shall also be deemed to unconditionally release the Fresenius
8 indemnified parties to the same extent as the release in the
9 preceding sentence." Are you aware that that sentence is also
10 in Section 8.8.7?

11 A Yes, I am familiar with that.

12 Q And is that also an exception to the general outline of
13 Section 8.8.7?

14 A Yes, or it's in addition to the other provisions of 8.8.7.
15 That sentence was essentially mandated to be included in the
16 plan by both the Fresenius settlement agreement and the order
17 of the court approving that agreement.

18 MS. ESAYIAN: Thank you, very much.

19 THE COURT: Mr. Plevin.

20 MR. PLEVIN: Your Honor, I've reached an agreement
21 with Ms. Esayian over the weekend whereby most of my cross
22 examination of Mr. Finke is coming in by way of deposition
23 designations. We did a little horse trading in which I
24 withdrew some designations, she withdrew some objections to
25 other designations, I withdrew objections to some of her

Finke - Cross/Plevin

187

1 counter designations and we agreed that I would ask a limited
2 number of questions on a specific topic. Ms. Esayian and I
3 will figure out how to get the revised designations to the
4 Court in a way that makes sense. We haven't figured that out
5 yet, but we will.

6 THE COURT: All right.

7 MR. PLEVIN: So I just have a few questions without
8 prejudice to that coming in.

9 CROSS EXAMINATION

10 BY MR. PLEVIN:

11 Q Good afternoon, Mr. Finke.

12 A Good afternoon.

13 Q Do you remember that we met at your deposition on May 13
14 of this year in Washington?

15 A Yes, I do.

16 Q As of that time whether Fireman's Funds Surety based
17 claims should be in Class 6 under the plan was still under
18 consideration and discussion at Grace, wasn't it?

19 A Yes, that's right.

20 MR. PLEVIN: No further questions, Your Honor. Thank
21 you.

22 THE COURT: Just one second, please.

23 MR. BERNICK: I'm not sure who was the best horse
24 trader on that one.

25 (Pause)

Finke - Cross/Brown

188

1 THE COURT: Go ahead, Mr. Brown.

2 MR. BROWN: Good afternoon, Your Honor. Just a minor
3 point. The questions I have for Mr. Finke this afternoon are
4 in my capacity as counsel for One Beacon America Insurance
5 Company and Seaton Insurance Company only.

6 THE COURT: All right.

7 CROSS EXAMINATION

8 BY MR. BROWN:

9 Q Good afternoon, Mr. Finke.

10 A Good afternoon, sir.

11 Q Do you have a screen in front of you with the language in
12 Plan Proponent's 505-1 in front of you?

13 A Yes, I do.

14 Q Okay. The first question I have is whether the language
15 that is highlighted in yellow is intended to modify only that
16 which comes after the comma, asbestos PD FCR, in other words,
17 is it only modifying the party's representatives or everything
18 that precedes that?

19 A I believe it just -- the way I read it, it just refers to
20 each such party's representatives.

21 Q Okay. So it's limited to just the representatives?

22 A Yes.

23 Q Now, Mr. Finke, you indicated that you had begun your
24 career in 1989 at Grace?

25 A Yes.

Finke - Cross/Brown

189

1 Q And at that time you were senior litigation counsel, is
2 that correct?

3 A Yes.

4 Q And you held that position as I understand it until March
5 of 2006?

6 A Actually it was September 2005.

7 Q September 2005.

8 A Yeah. I got the date wrong in my deposition, but I did
9 correct it.

10 Q Okay. And your title now is assistant general counsel for
11 litigation at Grace, correct?

12 A Yes.

13 Q When you first began back in 1989 you reported to Mr.
14 Beber, is that correct?

15 A Yes.

16 Q And he was the general counsel at the time?

17 A I'm sorry, in 1989?

18 Q When you started, yes.

19 A No, he was not.

20 Q When did he become general counsel?

21 A About a year or so thereafter.

22 Q Okay. And at that point you reported to him?

23 A Yes.

24 Q All right. Now he retired at some point, did he not?

25 A Yes.

Finke - Cross/Brown

190

1 Q And when was that?

2 MR. GUY: Objection, relevance, Your Honor.

3 THE COURT: Relevance, Mr. Brown?

4 MR. BROWN: Just a little bit of background, Your
5 Honor.

6 THE COURT: Well, help him out then if you know.

7 MR. BROWN: I don't know.

8 THE COURT: Oh.

9 A I believe in the late 1990s. I don't recall exactly when.

10 Q He was replaced then by Mr. Siegel, is that correct?

11 A Yes.

12 Q David Siegel?

13 A Yes.

14 Q And Mr. Siegel was the general counsel at the time,
15 correct?

16 A Yes.

17 Q And you reported to him?

18 A Yes.

19 Q Were you reporting to Mr. Siegel when Grace filed for
20 bankruptcy?

21 A Yes.

22 MR. BROWN: Your Honor, just -- I don't know whether
23 Mr. Finke has the plan proponent's exhibits in front of him or
24 available to him in a binder. I have the number. Perhaps it
25 could be brought up in the screen.

Finke - Cross/Brown

191

THE COURT: That's fine. I don't think he does. I
don't see any other binders.

3 MS. ESAYIAN: No, he doesn't have the complete set of
4 plan proponent's exhibits.

5 MR. BROWN: Okay.

6 Q Mr. Finke, I'd like you to take a look at what's been
7 marked as Plan Proponent's 243.

8 MR. BROWN: And actually I have a copy, Your Honor,
9 if I may approach the witness.

10 THE COURT: All right. We're still going to need it
11 on the screen or something for everyone else to follow.

12 MR. BROWN: I've got a marked up version of it, Your
13 Honor. Can you put it on the screen for us?

14 || (Pause)

15 Q Mr. Finke, you've seen this document before, have you not?

16 A I believe I did quite some time ago.

17 Q Okay. Can you turn to the very last page of it. It's
18 Bates label PP9948.

19 || A Okay.

20 Q Do you recognize the signature on that page as being Mr.
21 Siegel's signature?

22 A Yes.

23|| 0 okay.

24

admission of PP-243 into evidence.

Finke - Cross/Brown

192

1 THE COURT: Okay.

2 MR. GUY: Your Honor, I'm not sure what relevance
3 this is to anything.

4 MR. BROWN: Your Honor, I'll be happy to address
5 that. You may recall, Your Honor, from Friday's testimony that
6 Mr. Posner was somewhat equivocal on identifying Fresenius
7 Medical Care Holdings, Inc. and Sealed Air Corporation. This
8 document, which is a verified complaint for declaratory relief
9 which was filed in this case, sets forth a description of the
10 transactions pursuant to which W.R. Grace and Company, the New
11 York corporation, became Fresenius Medical Care Holdings, Inc.
12 It also sets forth the -- that's the Fresenius transaction.
13 It sets forth the details for the Sealed Air transaction, which
14 is the transaction pursuant to which W.R. Grace and Company,
15 Delaware, became Sealed Air Corporation. And it's accompanied
16 by a declaration by Mr. Siegel regarding those facts and it's
17 an admission of a party opponent.

18 MR. BERNICK: So what's the relevance?

19 THE COURT: I still don't know what the relevance is.

20 MR. BROWN: The relevance, Your Honor, is that the
21 plan is enjoining claims that my client, Seaton, has under one
22 of its pre-petition settlement agreements, claims against
23 Fresenius and Sealed Air. Those injunctions and releases are a
24 subject of our plan objections.

25 MR. BERNICK: I'm going to be putting on our witness

Finke - Cross/Brown

193

1 concerning those transactions and I still don't understand what
2 the relationship is (a)between this witness' testimony on
3 direct and this whole subject matter, and (b)what the corporate
4 history has to do with the injunctions issue that apparently
5 Seaton and One Beacon want to raise, and (c)what that has to do
6 with this witness.

7 MR. BROWN: Your Honor, I'm happy to address that.
8 This witness has testified about Section 8.8.7. I'm going to
9 ask him how the claim that my client has against Sealed Air
10 Corporation and Fresenius, is dealt with under that provision
11 and other provisions in the plan.

12 THE COURT: Okay.

13 MR. BERNICK: That would call for this witness'
14 interpretation and conclusion as a legal matter regarding the
15 application of the plan to this particular client and I still
16 don't see how that implicates anything about the verified
17 complaint. The verified complaint has got no nexus to any of
18 this.

19 THE COURT: Exhibit 213 will be admitted for the
20 limited purpose of --

21 MR. BROWN: I'm sorry, Your Honor, it's PP-243.

22 THE COURT: Oh, I'm sorry. Let me make a change
23 first. Exhibit 243 is admitted for the limited purpose of
24 substantiating the transactions by which one entity of Grace
25 became Fresenius Medical Holdings and another became Sealed Air

Finke - Cross/Brown

194

1 as an admission of a party.

2 MR. BERNICK: Your Honor, that's just the concern.

3 That's the part that has no bearing on this witness' testimony.
4 He's got no foundation that's been established for getting that
5 document in through this witness and it doesn't relate to his
6 direct examination and this is --

7 THE COURT: He just identified the signatory on a
8 sworn and subscribed document that's part of the Court's
9 record.

10 MR. BERNICK: But the issue is not whether this
11 document may come in through some means. The issue is whether
12 there's any foundation to ask this witness any questions
13 regarding it and what --

14 THE COURT: Well, I don't know about that.

15 MR. BERNICK: Well, that's the whole point, is that
16 --

17 THE COURT: There aren't any questions yet.

18 MR. BROWN: Your Honor, there are no questions about
19 the document.

20 MR. BERNICK: Well then why does the document come in
21 at this point in time through this witness? Mr. Shelnitz will
22 be testifying two witnesses down. He's the person who was
23 involved. It seems to me that if a document is to come in
24 there has to be a foundation through a witness. It's not
25 simply a question of its admissibility as falling within an

Finke - Cross/Brown

195

1 exception to the hearsay rule as an admission, it's a question
2 of 602 foundation. And there is no foundation through this
3 witness.

4 THE COURT: There is a foundation. He just
5 identified the signatory as the person he reports to on a
6 document that's a verified complaint.

7 MR. BERNICK: That's not the -- that's not foundation
8 for the substance of what the document has to say.

9 THE COURT: Okay. I see. You're challenging my
10 ruling as to the purpose for its admission.

11 MR. BERNICK: That's correct.

12 THE COURT: All right, that's fine. I'll withdraw
13 the purpose for its admission and simply say that it's
14 admitted.

15 MR. BROWN: Thank you, Your Honor. While we're on
16 this subject, Your Honor, I have three other documents that
17 pertain to the same issue.

18 MR. BERNICK: Then why don't we have them tendered
19 through a witness so we don't have to go through the same
20 exercise.

21 MR. BROWN: Your Honor, if I may. The document that
22 Your Honor has just admitted gives a relatively simplified
23 version of these transactions. There are two other documents
24 which are on our exhibit list. I believe they're also on the
25 plan proponent's exhibit list. They were the subject of a

Finke - Cross/Brown

196

1 request for judicial notice. There was no objection. And
2 indeed there's been no objection to the documents. Those
3 documents, Your Honor, are OS-50 and OS-51. They are
4 respectively the S-4 registration statements in connection with
5 the Fresenius transaction and the Sealed Air transaction and
6 they provide greater detail concerning the actual transactions.
7 They are indeed cited in the plan of reorganization and they
8 are SEC filings. We would ask that those be admitted, as well,
9 Your Honor.

10 MR. BERNICK: That again is improper for exactly the
11 same reason. You don't have a witness on the stand to now say
12 this is now the opportunity for us to put into evidence
13 whatever document we think is germane. The documents, all of
14 them, need a foundation. And there is no foundation through
15 this witness. They don't provide their own foundation. These
16 are pleadings. Pleadings simply go to the fact that they are
17 allegations. Those allegations may or may not be true. these
18 are --

19 MR. BROWN: Your Honor, these are SEC filings, they
20 are not pleadings.

21 MR. BERNICK: I'm talking about the first one first.
22 As to the SEC --

23 MR. BROWN: There's already been a ruling on the
24 first one.

25 MR. BERNICK: Well, no, there was only -- there was a

Finke - Cross/Brown

197

1 ruling that was very, very limited. This ought to be done in a
2 proper way through a live witness. This is not proper trial
3 procedure. It's not admissible under the Rules of Evidence.
4 This is Evidence 101. And this should be done through Mr.
5 Shelnitz who will be testifying shortly. All we're doing is
6 wasting the time of this witness as to whom there has been no
7 proper foundation established to deal with any of these
8 documents.

9 THE COURT: If there are no questions of the witness
10 about the substance, the document has been authenticated. It
11 is a document that is of record before the Court. I can take
12 judicial notice, let alone having it admitted as substantive
13 evidence of the fact that the document is part of the record
14 and is a verified complaint, and that is all. That's the only
15 purpose. There is nothing about the truth or not truth because
16 I struck that. I think you are correct in that respect.

17 With respect to SEC filings I haven't seen them. If
18 you want to show the parties to see whether or not they'll
19 agree that somehow or other this is -- they are admissible as
20 some recorded compilation of a government agency fine,
21 otherwise you need to do it through a witness.

22 MR. BROWN: Okay. Your Honor, a clarification if I
23 can. I had understood that PP-243 was admitted and the basis
24 for that was that it was an admission of a party
25 opponent.

Finke - Cross/Brown

198

1 THE COURT: I struck that because Mr. Bernick is
2 correct that a complaint is not an admission, it's an
3 allegation.

4 MR. BROWN: No, Your Honor, it is accompanied by a
5 declaration. The declaration --

6 MR. BERNICK: This is all a bunch of --

7 THE COURT: If it's not of this witness then you
8 can't authenticate it through this witness. If that's the case
9 then he is quite correct and the objection has to be sustained.
10 The exhibit is not admitted. You need to authenticate it if
11 it's the declaration you're looking for.

12 MR. BROWN: All right. Your Honor, if I may. It is
13 -- PP-243 was the subject of a request for judicial notice to
14 which there was no objection.

15 THE COURT: Fine, I can take judicial notice --

16 MR. BROWN: Okay.

17 THE COURT: -- of the fact that it is filed of
18 record, but that does not adjudicate the truth or content of
19 the document.

20 MR. BROWN: Mr. Finke authenticated the signature of
21 Mr. Siegel.

22 THE COURT: He did.

23 MR. BROWN: Mr. Siegel's declaration is attached to
24 the complaint. I'm happy to have just the declaration come
25 into evidence, Your Honor.

Finke - Cross/Brown

199

1 THE COURT: He cannot authenticate the truth or
2 falsity of the declaration, all he can do is authenticate that
3 it is the signature of a witness, that's all. You need to move
4 on, Mr. Brown. Mr. Bernick is correct. I retract the
5 admission of 243. It needs to come in through the proper
6 witness if what you are doing is attempting to use the
7 declaration as substantive evidence. So 243 is not admitted
8 although it has been authenticated.

9 BY MR. BROWN:

10 Q Mr. Finke, you've been practicing law a long time, have
11 you not?

12 A Yes, I guess I have.

13 Q Do you understand the difference between a release and an
14 injunction?

15 A I believe so.

16 Q If Judge Fitzgerald has a claim against me for breach of
17 contract, without Her Honor's consent are you able to release
18 that claim?

19 MR. GUY: Objection, Your Honor. Speculation,
20 hypothetical, calls for a legal conclusion.

21 MR. BROWN: This is expert testimony.

22 MR. GUY: Irrelevant.

23 THE COURT: Sustained.

24 Q Mr. Finke, you said that one of your pre-petition duties
25 was to deal with the asbestos property damage claims that were

Finke - Cross/Brown

200

1 brought against Grace, correct?

2 A Yes.

3 Q In the context of doing that, did you have occasion to
4 settle property damage claims?

5 A I was involved in the settlement of them. I did not
6 settle them myself.

7 Q What was your involvement?

8 A Reporting to Mr. Beber at the time all relevant facts,
9 issues, et cetera, and sometimes participating in settlement
10 negotiations with him and opposing counsel.

11 Q Okay. In the context of doing that did you have occasion
12 to obtain releases from claimants?

13 A Yes.

14 Q Okay. Did you ever accept a release from someone that was
15 not the claimant?

16 A Not that I recall.

17 Q Is it your general understanding that a release is
18 something given by one party to another?

19 MR. BERNICK: Your Honor, this again is the
20 continuation of the same line of questioning. Mr. Brown hasn't
21 turned the page to a new section of his outline. This is all
22 using Mr. Finke in order to establish what is essentially a
23 legal argument. It doesn't call for factual testimony. It's
24 not proper. It goes beyond the scope of direct and it
25 shouldn't be permitted.

1 MR. BROWN: Your Honor, two things. The first is
2 that I'm trying to make certain that Mr. Finke and I are on the
3 same page when we use the same terms. And the concept of
4 releases in the plan and the concept of injunctions in the plan
5 is conflated. So I'm simply trying to establish as a
6 foundation for my following questions that we're on the same
7 page as to what the distinction is between the two.

8 MR. BERNICK: Well, that's a very different question.
9 He can ask for what his understanding of the terms as used in
10 the plan are. Apparently he believes the plan is not properly
11 drafted. The place to sort that out is in his trial brief or
12 whatever. If he wants to direct Mr. Finke to a portion of the
13 plan, say what does this mean and then -- based upon this
14 definition and ask him some factual question, there won't be an
15 objection.

16 MR. BROWN: Your Honor --

17 THE COURT: Okay. The objection has to be sustained
18 as asked that asks for a legal conclusion, not a factual
19 statement.

20 MR. BROWN: Okay. Can I just get a clarification,
21 Your Honor, on who was the attorney that handled the direct
22 examination of Mr. Finke and whether it's appropriate for Mr.
23 Bernick to be lodging objections.

24 THE COURT: Ah.

25 MR. BERNICK: Well that's very simple, Your Honor.

Finke - Cross/Brown

202

1 The direct examination was extremely straightforward. Mr.
2 Finke was examined concerning why it was that Grace agreed to
3 this particular provision and how it was modified and then some
4 other related questions. Mr. Brown obviously has a very
5 different agenda that gets into many, many other issues and we
6 think frankly they're outside the proper scope of cross
7 examination. We'll raise them one by one. But these are
8 matters that go beyond what was anticipated from Mr. Finke.

9 THE COURT: They may, but nonetheless I think the
10 rule is that the person who asks the questions makes the
11 objections so we're going to use that rule. Go ahead, Mr.
12 Brown.

13 MR. BROWN: Thank you, Your Honor.

14 Q Mr. Finke, you've read the plan, correct?

15 A Yes.

16 Q Several times?

17 A Some parts many times, other parts just once.

18 Q Okay. You understand it?

19 A Not everything, no.

20 Q Is it safe to say that you understand Article 8 of the
21 plan which is entitled injunctions, releases and discharge?

22 A I have an understanding of Article 8, yes.

23 Q You just testified about portions of Article 8, did you
24 not?

25 A Yes, I did.

1 Q Would you take a look, Mr. Finke, at Section 8.8.7.

2 MR. BROWN: And, Your Honor, 8.8.7 was the subject of
3 a technical amendment. I'm not sure what's going -- is that
4 the technical amendment that's going up?

5 THE COURT: Are you talking about Exhibit PP505-1?

6 MR. BROWN: Yes, Your Honor, but as I noted earlier,
7 that's not complete.

8 THE COURT: Okay. So what are you referring to then?

9 MR. BROWN: I'm -- I don't know whether it's been
10 marked as an exhibit actually, Your Honor.

11 THE COURT: The plan itself?

12 MR. BROWN: The plan was marked as an exhibit, Your
13 Honor. I don't know whether the technical amendments to the
14 plan were marked as an exhibit.

15 THE COURT: I don't know.

16 MR. ESAYIAN: What technical amendments are you
17 referring to, the ones that were just filed on Friday?

18 MR. BROWN: September 4th.

19 MS. ESAYIAN: Okay.

20 MR. BROWN: Have they been marked as an exhibit?

21 MS. ESAYIAN: I don't believe so.

22 THE COURT: I don't think I've even seen them.

23 MR. BROWN: Your Honor, I have marked this OS-52.
24 May I approach the witness?

25 THE COURT: Yes. If you're going to be using them

Finke - Cross/Brown

204

1 you're either going to have to put them up on the overhead and
2 give me a copy later or else hand me a copy.

3 (Pause)

4 MR. BROWN: We apologize, Your Honor. We thought the
5 plan proponents would have the technical amendments.

6 THE COURT: You want someone on my staff to make some
7 copies? Do you have something else you can do for a few
8 minutes until we make a copy?

9 MR. BROWN: Your Honor, the provisions that Mr. Finke
10 just testified to on direct have been technically amended so I
11 wanted to use the set that had been amended.

12 THE COURT: Okay.

13 Q Okay, Mr. Finke, this is going to be a little bit of a
14 challenge because the technical amendment --

15 THE COURT: You're going to have to magnify it so
16 that it's legible.

17 MR. BROWN: All right, Your Honor?

18 THE COURT: It's fine.

19 MR. BROWN: Okay.

20 Q Mr. Finke, this is a little bit of a challenge. I don't
21 know whether you have 8.8.7 in front of you. There are no page
22 numbers on the technical amendment so I don't have one to refer
23 you to.

24 A Yeah, I have it in front of me.

25 Q Okay. The release that's granted in the first sentence of

Finke - Cross/Brown

205

1 8.8.7 only applies to holders of claims in equity interest to
2 vote in favor of the plan, correct?

3 A Yes.

4 Q So if my client, One Beacon, did not vote in favor of the
5 plan it's not deemed to have provided the release in that first
6 sentence, is that correct?

7 MS. ESAYIAN: Your Honor, I object. This calls for a
8 legal opinion and interpretation of this plan provision.

9 MR. BROWN: Your Honor, that's what we've been doing
10 all day.

11 THE COURT: It is what we've been doing all day.

12 MS. ESAYIAN: It's not something that he did in his
13 direct examination. He did not interpret plan provisions. He
14 provided the company's rationale for entering into certain plan
15 provisions.

16 THE COURT: Well, that's true, that is what he did,
17 nonetheless I think this is a fair question for the person who
18 indicated that he is familiar with these. So I'm going to
19 overrule it. If it turns out not to be relevant, I'll strike
20 it all later, but we need to get through this evidence. So
21 I'll accept this subject to a relevance and the fact that the
22 document speaks for itself. Objection.

23 Q Mr. Finke, if my client, One Beacon, did not vote in favor
24 of the plan, it's not deemed to have provided the release in
25 the first sentence of 8.8.7, correct?

1 A Yes, that's my understanding.

2 Q And that would be true for my client, Seaton, as well?

3 A If it did not vote in favor of the plan, correct.

4 Q Okay. Now the second sentence which Ms. Esayian referred
5 you to says, "In addition to the foregoing, each holder of a
6 claim or equity interest who receives or retains any property
7 under this plan, shall also be deemed to unconditionally
8 release the Fresenius indemnified parties to the same extent as
9 the release in the preceding sentence." Did I read that
10 correctly?

11 A Yes.

12 Q Okay. Now this provision is intended to bind all holders
13 of claims that receive or retain money, correct?

14 A Who receive or retain any property.

15 Q Okay. And that's true whether they voted for the plan or
16 not, correct?

17 A That is my understanding, yes.

18 Q What if they receive property and send it back?

19 MS. ESAYIAN: Objection, calls for speculation and a
20 legal conclusion.

21 THE COURT: Sustained.

22 Q All right. Mr. Finke, I want to refer you to another
23 provision in the plan. It's also in the technical amendments.
24 It was subject to technical amendments. It's Section 7.13.
25 Are you familiar with that provision of the plan, Mr. Finke?

1 A Yes, I am familiar with it.

2 Q Okay. I'm correct, am I not, that it is intended
3 primarily to protect nondebtors Fresenius and Sealed Air?

4 MS. ESAYIAN: Your Honor, I would lodge an objection
5 that this goes beyond the scope of the direct examination.

6 THE COURT: It does. That's sustained.

7 MR. BROWN: Your Honor, may I address it? It does
8 not go beyond the scope of the direct examination. The direct
9 examination dealt with the releases in the plan. This is a
10 release in the plan. It just doesn't happen to be in Article
11 8.

12 MS. ESAYIAN: But the direct exam didn't purport to
13 cover every release or every injunction in the plan, it only
14 covered three specific provisions.

15 THE COURT: Do you have this witness listed in your
16 own case, Mr. Brown?

17 MR. BROWN: Your Honor, we do have him listed in our
18 own case. We had him listed by deposition designation and that
19 has not been waived and at this point we're prepared to move
20 forward with him on direct if that's --

21 THE COURT: I think that's what's going to happen.
22 This is outside the scope of the direct that the debtors
23 produced. So while he's here you can ask him questions in your
24 own case.

25 Q Mr. Finke, I'm correct, am I not, that Section 7.13 of the

Finke - Cross/Brown

208

1 plan is primarily designed to protect nondebtors Fresenius and
2 Sealed Air?

3 MS. ESAYIAN: Same objection.

4 THE COURT: Sustained.

5 Q Mr. Finke, is it your understanding that Section 7.13 of
6 the plan protects Fresenius and Sealed Air?

7 MR. GUY: Objection, Your Honor.

8 THE COURT: Mr. Guy, your microphone is not on.

9 MR. GUY: Objection, Your Honor. The Court has
10 already ruled that this is beyond the scope of the --

11 THE COURT: He's on his case in chief and that
12 question is not objectionable. Overruled.

13 A I'm sorry, could you repeat the question.

14 Q Yes. Am I correct that Section 7.13 of the plan protects
15 nondebtors Fresenius and Sealed Air from certain claims?

16 A Yes, I believe it does.

17 MS. ESAYIAN: Your Honor, that's the objectionable
18 question that calls for a legal conclusion. The question that
19 wasn't objectionable was what his understanding was.

20 THE COURT: That's what he just repeated.

21 UNIDENTIFIED SPEAKER: No.

22 MS. ESAYIAN: He didn't use the word understanding
23 the last time around.

24 THE COURT: Oh, I'm sorry, I thought he did. Okay.
25 Would you restate the question, Mr. Brown?

Finke - Cross/Brown

209

1 Q Mr. Finke, do you understand Section 7.13 to protect
2 Fresenius and Sealed Air from the claims set forth therein?

3 A Yes, that is my understanding.

4 Q The heading it comes under is no successor liability,
5 correct?

6 A Yes.

7 Q I want to focus your attention on the second paragraph.
8 Unfortunately, it begins at the bottom of one page and
9 continues onto the next. Do you see where it says except as
10 otherwise expressly provided?

11 A Yes, I do.

12 Q Okay. I want to carry it over to the next page. It says,
13 "Except as otherwise expressly provided in this plan effective
14 automatically on the effective date the asbestos protected
15 parties shall be unconditionally irrevocably and fully released
16 from," and then it continues. Do you see that?

17 A Yes.

18 Q Okay. Would you agree with me that that's in the passive
19 voice?

20 A I have to ask you to define passive voice.

21 Q We don't know who is doing the releasing.

22 A I don't know that I can agree with you on that.

23 Q Can you tell me then who was doing the releasing?

24 A I would read it such that regardless of who was doing the
25 releasing, except as otherwise expressly provided in this plan,

Finke - Cross/Brown

210

1 the asbestos protected parties are released from the enumerated
2 claims.

3 Q Okay. Does it mean the world is releasing those claims?

4 MS. ESAYIAN: Objection, calls for a legal
5 conclusion.

6 THE COURT: Sustained.

7 Q Do you have an understanding as to the scope of the
8 parties that are releasing the claims set forth in 7.13?

9 A Yes, based on my reading of this provision.

10 Q Does it include my client One Beacon?

11 A It would appear to be binding on any entity --

12 Q And it would include --

13 A -- except as might be otherwise provided in the plan.

14 Q And it would include my client Seaton as well, would it
15 not?

16 A Yes.

17 Q I'm correct, am I not, that 7.13 is intended to release
18 both asbestos-related claims and non-asbestos-related claims?

19 MS. ESAYIAN: Objection, calls for a legal
20 conclusion.

21 THE COURT: Sustained.

22 Q Do you know, Mr. Finke, whether Section 7.13 releases
23 asbestos-related claims?

24 MS. ESAYIAN: Same objection.

25 THE COURT: Now, that's a do you know. It's a yes or

1 no, overruled.

2 A Yes.

3 Q It does?

4 A Yes.

5 THE COURT: The answer is yes he knows, I think.

6 MR. BROWN: He knows.

7 Q Does it?

8 A Yes, I believe it does.

9 Q Does it also release non-asbestos claims?

10 MS. ESAYIAN: I have an objection for the record that
11 this section speaks for itself, particularly on that kind of a
12 question.

13 THE COURT: Sustained.

14 Q Mr. Finke, do you know whether 7.13 releases
15 non-asbestos-related claims?

16 MS. ESAYIAN: Same objection.

17 MR. LOCKWOOD: Well, initial objection as to form.
18 All non-asbestos-related claims without regard to the
19 definitions used in the section?

20 THE COURT: Sustained.

21 Q Mr. Finke, do you know whether Section 7.13 releases any
22 non-asbestos-related claims?

23 MS. ESAYIAN: Same objection, speaks for itself.

24 THE COURT: No, this is a do you know, overruled.

25 A I have an understanding, yes.

1 Q What is your understanding?

2 A It appears to release some non-asbestos claims.

3 MR. BERNICK: Your Honor, I don't know if this might
4 be -- we would have a motion -- and I suspect that the other
5 plan proponents would join in it -- regarding the examination
6 of this witness generally. We'd like to make that motion and I
7 don't know if -- you know, this is the -- coming on the
8 afternoon break, but -- well, we would have a motion to make
9 with regard to the conduct of this examination. And it will
10 probably have application to other witnesses who are going to
11 testify on matters that relate to the plan in order to deal
12 with very specific requirements of the code in provide a
13 factual predicate, not an interpretation of the plan. And so,
14 at some point we'll continue to -- Ms. Esayian will continue to
15 make the objections as will other counsel, but we would like to
16 present a motion to the Court with regard to this issue.

17 THE COURT: All right, go ahead.

18 MR. BERNICK: I think that the federal rules do in
19 fact provide very clear guidance on this. Mr. Finke is a fact
20 witness. He can testify to the facts. The only fact that he
21 can testify to regarding this agreement, the plan, are facts
22 that relate to how it was put together if he knows them, and we
23 would have a foundation for them, and if that testimony would
24 otherwise be relevant and permissible. To the extent that any
25 question calls for any kind of inference or conclusion to be

1 drawn, it is plainly a question that he can only answer because
2 he's a lawyer. And under 7.01 and 7.02, that means it's expert
3 opinion.

4 To the extent that Mr. Finke is being called as a
5 witness on direct by the carriers here as part of their case,
6 they are essentially seeking to turn him into something that he
7 was never presented in our case to be, which is an expert
8 witness, nor have they disclosed him as an expert witness in
9 their case. So, we can continue to make all of these
10 objections, but it's very plain that any question that calls
11 for him to interpret the plan goes beyond the scope of his
12 designation by either side and turns him into an expert, and
13 that is just impermissible.

14 I know Your Honor wants to get on with the
15 examination to take evidence, but, you know, I think it's very
16 apparent that the whole thrust of this examination is, as I've
17 indicated, to turn him into an expert for the other side. And
18 under those circumstances by permitting the examination to
19 continue, it doesn't help expedite the trial. It will in fact
20 have the effect of prolonging the trial. So, I think it's very
21 important. We would make a motion to limit the examination of
22 Mr. Finke as part of either the cross examination of Mr. Finke
23 during our case or in service of presenting the case of
24 objectors to limit that examination to matters as to which Mr.
25 Finke has actual personal knowledge, and to preclude questions

1 that call on his skills as a lawyer.

2 UNIDENTIFIED SPEAKER: Your Honor?

3 MR. GUY: We would join in that --

4 UNIDENTIFIED SPEAKER: Your Honor?

5 MR. GUY: For the FCR we would join in that
6 objection. These questions go to what the plan says. No one
7 is saying it's unclear. There's no need to try to elicit
8 testimony from individual witnesses taking isolated portions of
9 the plan and asking for the witness' understanding of what the
10 plan does when the plan has it in there in black and white.
11 And in argument they can certainly refer to it in their briefs
12 and in oral argument, and in closing they can refer to it in
13 their briefs.

14 MR. BROWN: Your Honor, if I may address that. Mr.
15 Finke on direct testified to the intent behind 8.8.7 and other
16 provisions. I'm asking him about the intent behind this
17 provision, and I'm going to tie it to 8.8.7 in just a moment.
18 Indeed, if there were not so many interruptions in my
19 examination, we would have been there already.

20 THE COURT: All right, just a minute. Actually, I
21 don't have a reference in my notes to the word intent in his
22 examination. So, let me search it again just to make sure I
23 didn't miss it.

24 MR. BROWN: I might have used the word understanding,
25 Your Honor.

1 THE COURT: Well, his understanding and the intent
2 are two different things.

3 MR. BERNICK: Mr. Finke has to provide, as indeed the
4 debtor has to provide, certain factual predicates in order to
5 satisfy the requirements of the code. And that again is
6 factual testimony.

7 THE COURT: Right.

8 MR. BERNICK: There's almost not a single question
9 that Mr. Brown has asked that doesn't require that Mr. Finke
10 not only talk about what the intent or goal was of a certain
11 provision, but also asks him to interpret the language of that
12 --

13 THE COURT: I heard the objection, Mr. Bernick.

14 MR. BERNICK: Yes, I'm sorry, Your Honor.

15 THE COURT: Okay. With respect to the issue of the
16 fact that Mr. Finke testified about intent, my notes at this
17 point do not reflect that word in his examination.

18 MR. BROWN: All right.

19 THE COURT: That's not to say I take perfect notes,
20 but, nonetheless, I don't find it. So, I don't see how at this
21 point that ties into a statement regarding intent. With
22 respect to the issue that this is now approaching expertise, it
23 is. I thought I said it earlier that I would --

24 MR. BROWN: Your Honor -- okay.

25 THE COURT: -- take this subject to a Rule 7.01 and

Finke - Cross/Brown

216

1 7.02 objection. But, it is now getting to interpretative
2 issues, and this witness has been called as a fact witness.

3 MR. BROWN: All right, Your Honor, I think I can
4 solve the problem. On direct Mr. Finke was asked a number of
5 questions about the purpose of 8.8.7 and 8.8.8. So, I'll make
6 the questions about what the purpose is and maybe we can cut
7 through this.

8 THE COURT: All right.

9 BY MR. BROWN:

10 Q Mr. Finke, am I correct that the purpose of 11.13 is to
11 release certain types of asbestos-related claims.

12 MR. LOCKWOOD: 11.13 or 7.13?

13 MR. BROWN: I'm sorry, 7.13.

14 THE COURT: Have you substantiated that the witness
15 knows? I mean, he said he read the plan, but now we're into
16 fact testimony. So, you need to lay a foundation first.

17 MR. BROWN: Your Honor, I asked him if he was
18 familiar with the plan.

19 THE COURT: You did.

20 MR. BERNICK: That's not the same thing.

21 Q Mr. Finke, are you familiar with Section 7.13?

22 A I'm familiar with it in that I have, you know, previously
23 read it, yes.

24 Q Do you have an understanding as to its purpose --

25 MR. BERNICK: As to what its purpose was

1 historically?

2 A Yes, I do have a general understanding as to its purpose.

3 Q What is its purpose?

4 A My understanding is that it is intended to make clear that
5 no other entity or at least none of the entities specified in
6 Section 7.13 is to be deemed to be or considered to be a
7 successor to the debtors or any of the debtor's affiliates. I
8 believe it is also intended to protect asbestos protected
9 parties from certain types of claims based on historical
10 relationship and/or transactions between and among the asbestos
11 protected parties.

12 Q And would that include Fresenius Medical Care Holdings?

13 A Yes, I believe it would.

14 Q Would it also include Sealed Air Corporation?

15 A Yes, I believe it does.

16 Q And is the purpose of this provision among other things to
17 enjoin -- excuse me -- to release claims that my client, One
18 Beacon, might have against Fresenius or Sealed Air?

19 MS. ESAYIAN: Objection to the extent it calls for an
20 expert opinion as opposed to this witness' understanding.

21 THE COURT: That's sustained.

22 MR. BROWN: Your Honor, I'm using the same word
23 they're using, purpose.

24 MR. BERNICK: That's not the point.

25 THE COURT: Regardless, you have to substantiate that

Finke - Cross/Brown

218

1 this witness knows specifically as to your client what the
2 claims are, what the releases are supposed to do and that this
3 provision covers all of that, Mr. Brown. It's a much broader
4 question than just what does the plan say.

5 Q Mr. Finke, do you have an understanding or are you aware
6 that my client Seaton has asserted a misrepresentation claim
7 against Fresenius and Sealed Air?

8 A Yes, I believe I saw a letter that set forth that
9 allegation.

10 Q Okay. And that letter was from me, is that correct?

11 A I believe it was.

12 Q Do you have an understanding as to what the nature of that
13 claim is?

14 MS. ESAYIAN: Your Honor, we object to this line of
15 questioning without the letter in front of us, without the
16 letter in front of Mr. Finke so he can have some concrete
17 testimony about this and some understanding as to whether
18 really he knows what these claims are about or not.

19 THE COURT: Isn't this outside the scope of -- I
20 haven't understood that this witness right now is general
21 litigation, counsel, and I don't know the nature of the
22 allegations, Mr. Brown. I can't tell whether this is within
23 his actual knowledge or not. You need to lay a foundation.

24 MR. BROWN: I'll show him the letter.

25 THE COURT: Well, your sending a letter to them

Finke - Cross/Brown

219

1 doesn't mean that they agree with your allegations.

2 MR. BROWN: I'm not --

3 THE COURT: The question was that he was aware, he
4 said, yes, he knew. He was aware of it. So, where are you
5 going next?

6 Q Mr. Finke, do you have an understanding as to the nature
7 of that claim?

8 A Very, very superficial understanding.

9 Q Okay. Do you have enough of an understanding to know
10 whether that claim is released under 7.13?

11 MS. ESAYIAN: Objection to form and calls for a legal
12 conclusion.

13 THE COURT: Sustained.

14 (Pause)

15 MR. BROWN: Your Honor, may I approach the witness?

16 THE COURT: Mr. Brown, I hope you're making copies of
17 all of these exhibits because otherwise, the Court is not going
18 to have a record of everything you're using. And the order
19 said if you're going to use something in court to make a paper
20 copy. So far, you haven't handed up a single exhibit. So, I'm
21 concerned about what the record is going to be like.

22 MR. BROWN: Your Honor, it was my understanding that
23 the Court had copies of all of these exhibits.

24 THE COURT: Well, if I do in all of what you see
25 here, then tell me where --

Finke - Cross/Brown

220

1 MR. BROWN: Okay, well --

2 THE COURT: -- so I can look at them.

3 MR. BROWN: This is an exhibit on the plan
4 proponent's list, Your Honor, so.

5 THE COURT: What is it, please?

6 MR. BROWN: It is PP-239.

7 THE COURT: And where is it located in these binders?

8 MR. BERNICK: We'll try to pull you a copy, Your
9 Honor.

10 THE COURT: Please --

11 MR. BROWN: Your Honor, we were not privy to the
12 process by which these were provided to the Court. So, I'm at
13 a little bit of a disadvantage knowing what you have.

14 THE COURT: These are exhibits you are using. Why
15 don't you have your copies of your exhibits ready? That's I
16 guess the issue. But, okay, fine, we'll find it.

17 Q Mr. Finke, do you recognize PP-239?

18 A Yes.

19 Q Is this the letter that you just testified about?

20 A Yes, this is a copy of the letter that I saw and was
21 referring to.

22 Q Okay. And do you have an understanding as to the nature
23 of the claim asserted in this letter against Fresenius?

24 A In general, yes.

25 Q Do you know whether Section 7.13 of the plan -- whether

1 the purpose behind 7.13 of the plan was to release the sort of
2 claim or the type of claim that's described in PP-239?

3 MS. ESAYIAN: Objection to form, also calls for a
4 legal conclusion, and also invades the privilege as he was
5 litigation counsel and was involved in discussions regarding
6 how to deal with this letter.

7 MR. BROWN: Your Honor, I'm simply trying to lay a
8 foundation about the nature of the claims that my client has
9 and the impact of the releases on that claim.

10 THE COURT: Well, I understand but that's -- this
11 witness can't testify to what your client thinks the impact of
12 the plan is on its claim. That's wholly not -- that's wholly
13 outside the scope of this witness' capabilities. To the extent
14 that you have something that is a fact question, you may ask
15 it. But, you're asking for legal conclusions. and to the
16 extent that he was counsel, there's an objection, a privilege
17 issue which at this point I have to sustain. But, folks, at
18 some point, the debtor is going to have to tell me what it
19 thinks these things mean.

20 MR. BERNICK: Well, Your Honor, that is fine. We're
21 trying to see right now whether Seaton One Beacon even had an
22 objection to this particular provision. But, most certainly we
23 do. And we supplied trial briefs. And after this process is
24 done, there will be more trial brief where people who are
25 totally versed in the plan will respond to these issues. Mr.

Finke - Cross/Brown

222

1 Finke is stepping forward to provide limited factual testimony.
2 They can't take in-house counsel for Grace and seek to elicit
3 from him support for their legal arguments and legal
4 interpretation. That's all --

5 THE COURT: I've already --

6 MR. BERNICK: Yes.

7 THE COURT: -- sustained the objection. So, okay,
8 Mr. Brown.

9 Q Mr. Finke, are you familiar with the filings that have
10 been made by Kaneb in this bankruptcy case?

11 A Yes, I am.

12 Q Have you reviewed them?

13 A Yes, I have.

14 Q You understand the allegations that are set forth in them?

15 A I have an understanding of them, yes, I think so.

16 Q Are you familiar with the two lift stay motions that Kaneb
17 filed?

18 A Yes.

19 Q You understand, don't you, that one of them related to the
20 Otis Pipeline environmental site in Massachusetts?

21 A Yes.

22 Q And you understand that the other related to the Macon,
23 Georgia environmental site?

24 A Yes.

25 Q Okay. What do you understand to be Kaneb's allegations,

1 vis-a-vis settled asbestos insurance companies?

2 A My understanding is that Kaneb believes it has rights to
3 certain insurance coverage that had been purchased by Grace and
4 which Kaneb has a right to by virtue of its acquisition of a
5 former Grace subsidiary.

6 Q Okay. Can you take a look at OS-40, which is in one of
7 your binders there?

8 MR. BERNICK: OS what?

9 MR. BROWN: Forty.

10 MR. BERNICK: Forty.

11 MR. BROWN: Four, zero.

12 THE COURT: Do I have this somewhere?

13 MR. BROWN: You have this on disk, Your Honor, and
14 hard copies.

15 THE COURT: I have hard copies? Unless they're in a
16 binder, the hard copies that I was provided Friday and the
17 OS-7 and that includes some GR exhibits.

18 MR. BROWN: All right. I'm informed by my colleague,
19 Your Honor, that we provided these in hard copy form to the
20 plan proponents and that the plan proponents provided them to
21 the Court.

22 THE COURT: Okay. I have all of these binders. I
23 need to know where in these binders these documents are.

24 MS. BAER: Your Honor, if I could just clarify, we
25 provided as you requested a disk of all plan proponents and all

1 plan objectors' exhibits. We informed each plan objector that
2 if they were going to use an exhibit at the hearing, they
3 needed to bring a hard copy, that you did not want hard copy
4 exhibits in those binders and you do not have hard copy
5 exhibits in those binders. What you do have in the binders are
6 the plan documents, the plan, the disclosure statement, those
7 exhibits, and we can point those to you. But, to the extent
8 that they're using exhibits other than that, they were to bring
9 hard copies and that's what we're all doing.

10 UNIDENTIFIED SPEAKER: Your Honor?

11 THE COURT: All right. Everybody who is going to use
12 an exhibit in court has to bring a hard copy for the witness
13 and for me starting tomorrow. And, Mr. Brown, you can submit
14 yours after the fact since you don't have them here today.

15 MR. BROWN: We'll do that, Your Honor.

16 THE COURT: All right.

17 MR. BROWN: Your Honor, I did not understand that to
18 be the protocol. Indeed we were specifically told that Your
19 Honor didn't want hard copies.

20 THE COURT: No, I think the -- at least a discussion
21 if not an order, I can't remember which, Mr. Brown, said I did
22 not want hard copies except to the extent they were going to be
23 shown to a witness at trial. I wanted hard copies only of the
24 portions that would be presented to the witness at trial. I'm
25 certain that's what I said because I said it more than once.

Finke - Cross/Brown

225

1 But, in any event, it's fine. If you can just substitute them
2 later, I'll catch up with you.

3 BY MR. BROWN:

4 Q Mr. Finke, do you have a copy of OS-40 in front of you?

5 A Yes, I do.

6 Q Could you identify it, please?

7 A It is a motion of Kaneb Pipeline Operating Partnership, LP
8 and Support Terminal Services, Inc. for an order modifying the
9 automatic stay.

10 Q Okay. And I'm correct, am I not, that in that filing
11 Kaneb wanted the lifting of the stay in part so that Kaneb
12 could pursue certain Grace insurers? If you look at -- if you
13 look at Page XXX1115 --

14 MR. GUY: Your Honor, for the FCR I'm willing to
15 stipulate whatever that motion says it says. We're not
16 offering it for the truth of the matter asserted, but it says
17 what it says. To ask the witness to go through it and talk
18 about what another third party intended in its motion is
19 improper.

20 MR. BROWN: Your Honor, if -- part of what I am
21 trying to do is to establish that claims have been asserted
22 against my clients in the context of this bankruptcy case that
23 trigger claims by my clients against the debtors and certain
24 non-debtor third parties, namely Fresenius and Sealed Air. I
25 am trying to lay a foundation with these documents that the

1 claim has been asserted against us, that it is covered by
2 either the indemnity provisions or that it triggers a
3 misrepresentation claim, and then how that claim is being
4 impacted, released or enjoined under the plan.

5 MR. GUY: Objection, Your Honor. Those are all legal
6 arguments.

7 THE COURT: Well, they're -- it's not just legal
8 argument. The fact is that whether a claim has been asserted
9 against your client coming from a pleading is not an admission
10 against the debtor or the plan proponents. So, you can't do
11 that through this process.

12 MR. BROWN: Your Honor, I am not asking that this
13 document be admitted for the truth of the matter asserted,
14 quite the contrary. I'm simply asking when I move for its
15 admission that it be admitted for purpose of demonstrating that
16 a claim has in fact been asserted against my clients.

17 MR. BERNICK: Your Honor, there really is a simpler
18 -- much simpler solution. There's no question in fact, the
19 next witness until this direct examination began -- and I'm now
20 reconsidering whether it's prudent to call the next witness.
21 The next witness was going to go through each of the objectors'
22 claims, that is to say how claims have arisen against each of
23 these objectors, including claims against Beacon One Seaton in
24 order to explain the relationship between those claims and the
25 underlying liability. There's not any issue in this case but

1 that people have asserted claims against Mr. Brown's clients.
2 And there's no question in this case that Mr. Brown is taking
3 steps through his client in light of those claims. That's not
4 really at issue at all.

5 What is at issue is using this witness to say, well,
6 okay, (a) are you aware of it, he may or may not be, (b) how
7 does it get treated under the plan? That's the problem. We
8 don't need to take up this witness' time with establishing the
9 predicate facts about what kinds of claims are arising against
10 the various objectors here. We agree that that's happening.
11 The real issue is what is the consequence of that with respect
12 to the plan issues before the Court. Mr. Finke can't address
13 that. He's not a bankruptcy lawyer and he can't address the
14 plan because -- well, as I -- there I'm repeating myself.
15 That's the source of the problem, not the predicate facts that
16 Mr. Brown wants to get in, which we would probably be prepared
17 to stipulate to.

18 MR. BROWN: Your Honor, there may be a way to cut
19 through some of this. We have a number of documents that we
20 would like admitted into evidence that I don't think really
21 need to be proffered through a witness. The plan proponents
22 have insisted that that process be left until the close of the
23 confirmation hearing, at which point if there is an issue about
24 getting some of those documents into evidence, it will be too
25 late to really solve the problem. So, if we could have a

1 recess and address some of these issues, I can get these
2 documents into evidence and let this witness go.

3 THE COURT: You will have a recess from 5:30 on
4 tonight at which you may have this conversation to your heart's
5 content. And if you want to defer your cross examination until
6 tomorrow so that you can undertake that effort, that's fine.

7 MR. BERNICK: Your Honor, I would agree. There's
8 only one issue with that which is that we now understand the
9 reality of what's happening here, which is that Mr. Brown's
10 client doesn't like the procedures that have been set up in
11 this case. We set up -- because what he's doing here, if he
12 gets to defer his cross pending an in-trial conference
13 regarding the admissibility of exhibits including relevance and
14 other things so that he can then conduct a cross examination,
15 we will have everybody on this side of the room engaging in the
16 same negotiation.

17 We took the position that the documents because Your
18 Honor is not going to decide on deposition designations and is
19 not going to decide on documents until after the fact, the
20 issues of relevance should be deferred. And that's just the
21 way that it's going to be. If we do it any other way, we will
22 be sitting here watching the clock run while people try to get
23 their documents in.

24 THE COURT: Mr. Bernick, we are watching the clock
25 run as people are trying to get the documents in.

1 MR. BERNICK: I know. I'm trying to solve that
2 problem.

3 THE COURT: So, to the extent that a conference with
4 respect to a -- for example, if in fact it's not disputed that
5 there are claims asserted against certain of the insurers, then
6 a stipulation to that effect would certainly eliminate what's
7 now been going on for over an hour.

8 MR. BERNICK: Right, but I really think the solution
9 there is the stipulation as opposed to holding back on cross
10 examination such that if the document -- if you can't reach
11 agreement on the document, then we --

12 THE COURT: I can't get a stipulation in until I have
13 you talk, and I don't want to waste the next two hours of trial
14 testimony with witnesses while you do it. You've got all night
15 from 5:30 on to get those stipulations worked out. So, you're
16 hereby ordered to confer to see whether or not you can arrive
17 at some stipulations that will eliminate the need for witnesses
18 on anybody's behalf.

19 MR. BROWN: Your Honor, that is fine. And I just
20 want to point out, we started this morning when I indicated
21 that we were trying to do some horse trading. The horse
22 trading that I was referring to was to get these types of
23 exhibits in, and I couldn't get a stipulation from the other
24 side. So, they forced us to do this. I mean, Mr. Bernick sits
25 here and tells -- you know, is --

1 THE COURT: Okay. I understand. I do understand
2 that it has been somewhat of a frustrating process for
3 everyone. The issue is this. If in fact there is no dispute
4 of the nature of the claims that are being asserted against, in
5 your case One Beacon Seaton, then I don't understand why we
6 need to burden this witness or anybody else with the facts that
7 he may or may not know. Talk to each other and get a
8 stipulation done.

9 MR. BROWN: Your Honor, I will defer my cross
10 examination pending that stipulation.

11 THE COURT: All right. If it's not stipulated, Mr.
12 Brown, as soon as whoever is on the stand finishes tomorrow,
13 you're up next.

14 MR. BROWN: Thank you.

15 THE COURT: All right. Let's take a ten-minute
16 recess. Maybe you can get it done in ten minutes.

17 MR. BROWN: I think we can. I thought we were close.

18 MR. BERNICK: Yes, but just -- Your Honor, that was
19 really --

20 THE COURT: We're in recess.

21 || (Recess)

22 THE COURT: Please be seated. Are you ready, Mr.
23 Finke?

24 MR. BERNICK: I don't know that anybody -- well, I
25 know Mr. Cohn I know wanted to do some cross.

Finke - Cross/Cohn

231

1 THE COURT: Mr. Finke, are you ready?

2 MR. FINKE: Yes, I am.

3 THE COURT: Yes, sir, all right.

4 MR. BERNICK: Can we find out if anybody else intends
5 to cross examine Mr. Finke? Has anyone heard that anybody else
6 intends to cross examine? Okay. Well, let's start with Mr.
7 Cohn.

8 THE COURT: All right. Mr. Cohn?

9 MR. COHN: Thank you, Your Honor.

10 BY MR. COHN:

11 Q Good afternoon, Mr. Finke. I'm Dan Cohn. I represent --

12 A Good afternoon.

13 Q Thank you. I represent the Libby Claimants. Do you
14 recall -- it must seem like some time ago, but do you recall
15 testifying on direct examination about the contributions that
16 Grace would make on behalf of various pre-petition settled
17 insurers?

18 A Yes.

19 Q All right. And just for clarity, those pre-petition
20 settled insurers are insurers who settled with Grace prior to
21 the Chapter 11 case and paid whatever consideration they were
22 going to pay such that it was received by the debtors prior to
23 the Chapter 11. Is that your understanding?

24 A Yes.

25 Q Now, what are the contributions that are being made on

1 behalf of these insurers?

2 A The contributions that the debtors are making to the
3 524(g) trusts, which is a combination of cash and the warrants,
4 asbestos insurance rights, et cetera.

5 Q And what portion of those assets represents a contribution
6 by the debtors on behalf of themselves versus a contribution
7 made on behalf of the insurers?

8 A No specific portion of the debtors' total contribution has
9 been set aside or allocated or denoted to remain on behalf of
10 the settled asbestos insurance companies.

11 Q Is there a provision of the plan that specifies that an
12 undetermined portion of the assets that are being contributed
13 to the trust are being contributed on behalf of the insurers?

14 A I don't recall a plan provision that sets that out, no.

15 Q And if a particular insurer were to be removed from the
16 list of asbestos protected parties being protected by the
17 Section 524G injunction, would that entitle Grace to a decrease
18 in the amount of assets contributed to the asbestos PI trust?

19 MS. ESAYIAN: Objection, calls for speculation.

20 MR. BERNICK: And a legal conclusion.

21 MS. ESAYIAN: And a legal conclusion.

22 THE COURT: No, I don't think so. I think this is a
23 factual statement based on the fact that the witness said
24 there's not an allocation that's been made, overruled.

25 A No, I don't believe so.

1 Q So, even if all the pre-petition settled insurers were to
2 be removed from the protection of a Section 524G injunction and
3 thus no contributions would be made on their behalf, Grace
4 would contribute the same amount to the trust, correct?

5 MS. ESAYIAN: Objection, that clearly calls for a
6 legal conclusion.

7 THE COURT: It does, sustained.

8 Q How much -- strike that. What is the value if any of the
9 assets that are being contributed to the asbestos PI trust on
10 behalf of Maryland Casualty Company?

11 A As I said, no specific allocation or amount has been
12 denoted to apply to any particular settled asbestos insurance
13 company.

14 Q And when you say that assets are being contributed on
15 behalf of the insurers, how do you know that?

16 A That was a determination that Grace made in furtherance of
17 the, you know, objectives -- Grace's objectives in the Chapter
18 11 such as to preserve its assets such as to, you know, support
19 and prevent the undermining of the releases, discharges and
20 injunctions in the plan.

21 Q And is that determination set forth in writing?

22 A I believe it was in our trial brief. I'm not entirely --
23 I think it has been in writing, but in sitting here right now I
24 can't recall. I couldn't point you exactly to where it is.

25 Q Were you involved in making that determination?

1 A No, I was not.

2 Q How was that determination -- strike that. Was that
3 determination communicated to you?

4 MS. ESAYIAN: Objection to the extent that it calls
5 for privilege.

6 THE COURT: To the extent what?

7 MS. ESAYIAN: To the extent that it invades the
8 privilege.

9 THE COURT: Now, all right, can you clarify by whom,
10 please?

11 MR. COHN: Well, I can, Your Honor, however, this
12 witness testified on direct that he was advised by counsel that
13 this was legally sufficient in the Third Circuit or words to
14 that effect. And, therefore, there is a waiver, at least to
15 this issue, of any attorney-client privilege. So, what I would
16 like to ask is was this communicated to the witness by anyone
17 including by counsel.

18 MS. ESAYIAN: But, the question wasn't about the law
19 in the Third Circuit and how that was communicated to the
20 witness. The question was about how the determination as to
21 whether the substantial contributions that Grace was making to
22 the plan on -- were on behalf of all those insurance parties,
23 whether that was communicated to the witness and by whom.

24 THE COURT: Yes, but I think on direct the witness
25 said that he was advised by counsel that this was an

1 appropriate provision to include in the plan. So, if he's
2 already said that he was advised by counsel, then I'm not sure
3 that that's not a waiver. Did I miss something?

4 MR. GUY: Your Honor, I don't think he talked about
5 substantial contributions. I think he was talking about the
6 appropriateness of the releases.

7 THE COURT: Oh, I'm sorry. I think that's correct.
8 I think, Mr. Cohn, I don't think he did talk about the
9 substantial contribution. He did talk about the scope of the
10 releases.

11 MR. COHN: Well, I --

12 THE COURT: So, I don't think the question has been
13 -- the privilege has been waived as to this. So, if you can
14 narrow your questions?

15 MR. COHN: Well, Your Honor, I think we should go
16 back. And I realize that presents a logistical difficulty, but
17 we need to go back and look at the transcript in this regard
18 because my notes do reflect that the statement was made in
19 regard to the matter of the contributions on behalf of
20 insurers.

21 THE COURT: Okay. Well, the only way we're going to
22 do that from the official record is to wait until somebody can
23 point us out to where, and frankly that's going to be
24 difficult. I don't know whether the folks who have the
25 instantaneous transcripts can do this or not as some unofficial

Finke - Cross/Cohn

236

1 purpose. Otherwise, we can take a recess until tomorrow until
2 we find it.

3 MR. COHN: Well, if Mr. Finke is coming back tomorrow
4 anyway because of Mr. Brown, then --

5 THE COURT: He will be back tomorrow.

6 MR. COHN: Then, we can do that. And so, in the
7 meantime, why don't I proceed without asking for privilege
8 communications.

9 THE COURT: All right.

10 BY MR. COHN:

11 Q So, Mr. Finke, was the determination to attribute Grace's
12 contributions to the asbestos PI trust in part contributions on
13 behalf of the insurers communicated to you by someone other
14 than an attorney for Grace?

15 A No.

16 MR. COHN: No further questions, Your Honor.

17 THE COURT: Anyone else have questions for this
18 witness?

19 (No verbal response)

20 THE COURT: I think it may make sense to not do any
21 further redirect until after the cross examination is finished.
22 Is that what your expectation is?

23 MR. BERNICK: Well, I think that -- do you have the
24 -- if you just give us half a second?

25 (Pause)

1 MR. BERNICK: I think we'll just close out the
2 witness' testimony so far. Then, if he is recalled tomorrow to
3 testify to further matters, which we hope to be able to work
4 out, I think we just ought to regard that separately.

5 THE COURT: All right, that's fine.

6 REDIRECT EXAMINATION

7 BY MS. ESAYIAN:

8 Q You were asked by Mr. Brown a number of questions about
9 Section 7.13 in the plan, the provision titled, no successor
10 liability. I'm sure you recall those questions. Can you tell
11 us what connection, what relationship is there between that
12 provision, Section 7.13, and the requirements of the order
13 approving the Fresenius settlement agreement?

14 MR. BROWN: Objection, Your Honor, lack of
15 foundation.

16 THE COURT: Sustained.

17 MR. BERNICK: If he knows it. Do you know?

18 MS. ESAYIAN: Well, let me -- I mean, I can -- we can
19 lay some foundation.

20 Q I mean, Mr. Finke, are you familiar with the -- are you
21 generally familiar with the Fresenius settlement agreement and
22 the order approving it?

23 A Very generally familiar with the settlement agreement.

24 Q Based on your general familiarity with the settlement
25 agreement, are you able to tell us what the relationship is

Finke - Redirect/Esayan

238

1 between 7.13 and that settlement agreement?

2 MR. BROWN: Objection, Your Honor, calls for a legal
3 conclusion.

4 THE COURT: This only calls for a yes or no,
5 overruled.

6 A I would be guessing, so no.

7 Q Okay, thank you.

8 MS. ESAYIAN: We'll cover it with another witness.

9 THE COURT: Is that all?

10 MR. BERNICK: I think that's all, yes.

11 THE COURT: Mr. Finke, you're excused until tomorrow,
12 sir, but I'll need you back tomorrow.

13 MR. BERNICK: And as I understand the rules of the
14 road tomorrow, he's being recalled tomorrow in the event that
15 we're not able to reach agreement with Mr. Brown regarding the
16 documents that he wants to get in and with respect to Mr.
17 Cohn's --

18 MR. COHN: I can make that easier, Your Honor. We'll
19 waive the right to any further examination of Mr. Finke.

20 MR. BERNICK: Thank you.

21 THE COURT: Oh, all right.

22 MR. BERNICK: So, the purpose of his being recalled
23 tomorrow then is for Mr. Brown's benefit, is that right?

24 THE COURT: Yes.

25 MR. BERNICK: All right. Our next witness will be

Hughes - Direct/Bernick

239

1 Jay Hughes.

2 JAY HUGHES, DEBTOR'S WITNESS, SWORN

3 (Pause)

4 MR. BERNICK: Could you please swear the witness?

5 THE COURT: He is --

6 MR. BERNICK: Oh, I'm sorry.

7 DIRECT EXAMINATION

8 BY MR. BERNICK:

9 Q Good afternoon, Mr. Hughes. Are you the same Mr. Hughes
10 that made that brilliant cameo appearance here the other day?

11 A Yes, I am.

12 Q Okay. We have just a series of really kind of three
13 particular pieces to put in place here. I want to begin with
14 the settlement criteria. Prior to the time that Grace filed a
15 Chapter 11 petition, I take it from much testimony that we have
16 heard here throughout this proceeding, obviously there were a
17 number of personal injury settlements, is that correct?

18 A Yes, there was.

19 Q Okay. Tell me whether or not -- in the course of agreeing
20 to these settlements tell me whether or not Grace adopted as it
21 went along certain settlement criteria.

22 A Yes.

23 Q Could you just tell us in general terms what the
24 settlement criteria were where you had rather large
25 settlements, the bulk of the settlements?

Hughes - Direct/Bernick

240

1 A Generally, we required some evidence of exposure to a
2 Grace product and a diagnosis of an asbestos-related disease
3 from a qualified physician.

4 Q I want to show you what we marked as Plan Proponents
5 Exhibit Number 1, and specifically Pages 1 through 16 of that.

6 MR. BERNICK: Have we handed up a notebook to the
7 Court yet? And which tab do you know that it is? Okay, so,
8 yes, it's at the very end of your binder, Your Honor. It's
9 called, Confidential Settlement Agreement, and do you have that
10 in front of you, Mr. Hughes?

11 THE COURT: I'm sorry, what is the tab number?

12 MR. BERNICK: It's at the very end. It's probably
13 added on at the end, handwritten, PP-1.

14 MR. FINCH: It's a portion of Plan Proponents'
15 Exhibit 1, Your Honor.

16 THE COURT: I'm sorry, I don't see one in this
17 binder. Maybe I'm missing it. The last one I have in the
18 binder is 277.04.

19 MR. BERNICK: Yes, it's --

20 THE COURT: Oh, PP-1, I see it. I apologize. I've
21 got it.

22 MR. BERNICK: Okay. Yes, she's got it.

23 Q Could you identify that document?

24 A Sure. It's a settlement agreement between Grace and
25 settling plaintiffs represented by the law firm of Baron and

Hughes - Direct/Bernick

241

1 Budd. That was from I believe 1998.

2 Q Okay.

3 MR. COHN: And I want to offer into evidence Plan
4 Proponents Exhibit 1, but only Pages 1 through 16. The rest of
5 it is very bulky and not material.

6 THE COURT: It's admitted.

7 Q Directing your attention, this is a settlement agreement
8 with the Baron and Budd firm.

9 A Yes.

10 Q Did this cover a number of different claims?

11 A Yes, it did, approximately 9,800.

12 Q Okay. And directing your attention to Pages 6 and 7,
13 Paragraph 8, could you tell the Court whether or not the
14 criteria for accepting the settlement of this number of claims,
15 whether those criteria were spelled out in Paragraph 8?

16 A Yes, they are.

17 Q Directing your attention to the bottom of Page 6, does the
18 bottom of Page 6 in Paragraph 8 actually spell out what's
19 necessary for exposure evidence?

20 A Yes, it does.

21 Q Okay. Beyond saying -- beyond where you have a worker to
22 work site beyond demonstrating that there has been other
23 evidence that the Grace products were at that site and (b) that
24 the settling plaintiff during a time when it's reasonable to
25 expect that the settling plaintiff would have been exposed to

Hughes - Direct/Bernick

242

1 Grace work product, other than being able to show there was
2 product at the site and the claimant was working there during a
3 time when they could have been exposed at the site, was there
4 any other exposure requirement?

5 A No, there wasn't.

6 Q And when it comes to medical evidence -- and I want to
7 direct your attention specifically to medical evidence relating
8 to non-malignant asbestos-related disease. What did it take --
9 what was sufficient to get a settlement of a non-malignant
10 asbestos-related disease in connection with this settlement?

11 What did you have to have?

12 A Diagnosis by a competent physician.

13 Q But, if you didn't have that but you had a B-read
14 confirming the condition was that also enough?

15 A Yes.

16 Q There has been a lot of discussion about, you know, other
17 requirements that we have in particular in the TDPs. I don't
18 want to get into the substance of that. That's for other
19 people to talk about and I don't want to ask you to draw
20 inferences or conclusions. But, was there any other real
21 requirement in order to get qualification of the medical
22 criteria other than simply having the diagnosis or having the
23 B-read?

24 A No, there generally wasn't.

25 Q Is this the only settlement that spelled out and adopted

Hughes - Direct/Bernick

243

1 those kinds of criteria?

2 A No, there were several inventory type settlements that we
3 reached with plaintiffs' law firms that had large number of
4 cases that had similar criteria.

5 Q Let me ask you some questions about the -- another
6 pre-petition fact which is, what took place with regard to the
7 consent of insurers to settlements? Prior to the filing of the
8 Chapter 11 were there certain insurers that had a -- by
9 contract a right to offer -- to either give or withhold consent
10 with regard to settlements that were taking place?

11 A Yes, there were.

12 Q And were you involved, were you knowledgeable concerning
13 what happened with respect to whether those consents were
14 withheld or not provided?

15 A Yes, I was involved in providing the information to the
16 insurers.

17 Q Okay. And what was your experience as to whether insurers
18 insisted upon their --

19 MR. BROWN: Objection, Your Honor, form of the
20 question, use of the term insurers in the context of this case
21 is vague. There are --

22 THE COURT: All right, that's sustained.

23 MR. BROWN: -- unsettled insurers. There are
24 reimbursements insurers.

25 THE COURT: That's sustained.

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Hughes - Direct/Bernick

244

1 MR. BERNICK: That's fine.

2 Q With respect to reimbursement insurers, did the
3 reimbursement insurers withhold their consent?

4 A Not to settlements as I recall. There were -- no.

5 Q What about unsettled insurers?

6 A No.

7 MS. DeCRISTOFARO: Objection, Your Honor.

8 THE COURT: You folks need to use a microphone. Ms.
9 DeCristofaro, you've got one so we'll start with you.

10 MS. DeCRISTOFARO: Okay. Your Honor, the relevance
11 of this testimony to unsettled insurers who weren't having
12 these agreements tendered to them for approval, I would move to
13 strike all of this. The only offer that they've made that
14 there is a consent requirement that I've seen is by parties who
15 aren't participating anymore. If so, it's not admissible as to
16 unsettled insurers.

17 MR. BERNICK: Well, I'll respond to the earnest
18 suggestion that we limit this to the settled insurers, because
19 I'm told by my counsel that it only relates to the settled
20 insurers.

21 UNIDENTIFIED SPEAKER: Coverage in place insurers.

22 UNIDENTIFIED SPEAKER: Reimbursement insurers.

23 MR. BERNICK: But, as defined that is coverage in
24 place insurers. Did I get that right? No? Okay. Well,
25 anyway that's going to be the focus of my question with respect

Hughes - Direct/Bernick

245

1 to the coverage in place insurers, and I believe that that's
2 defined under the plan as reimbursement insurers.

3 Q Was your -- what was your experience as to whether consent
4 was withheld?

5 A I don't recall a specific incident where consent was
6 withheld for a settlement.

7 Q Okay. I want to show you --

8 MS. DeCRISTOFARO: Again, Your Honor, may we have a
9 clarification about which insurers they're talking about?

10 MR. FINCH: We're talking about reimbursement
11 insurers.

12 MR. BERNICK: I already got that. So, with respect
13 to --

14 MS. DeCRISTOFARO: All reimbursement insurers? Most
15 of them aren't participating.

16 MR. BERNICK: Your Honor, that goes to -- the
17 question is the witness' practice and experience. If they want
18 to bring out on cross examination what it is that he knows
19 about a particular carrier, they can.

20 THE COURT: His testimony is he doesn't recall a
21 single instance where a reimbursement insurer as defined
22 refused to consent to a settlement. So, his testimony is on
23 record, the rest of it's subject to cross examination. Go
24 ahead, Mr. Bernick.

25 MR. BERNICK: Thank you.

Hughes - Direct/Bernick

246

1 Q I want to direct your attention to Plan Proponents'
2 Exhibit 95.

3 MR. BERNICK: Where is that in the book? Is that at
4 the back end, too?

5 UNIDENTIFIED SPEAKER: Number 12.

6 MR. BERNICK: Number 12.

7 Q Do you have that, Mr. Hughes?

8 A Yes.

9 MR. BERNICK: Your Honor, do you --

10 THE COURT: I have it.

11 MR. BERNICK: Okay.

12 Q Is that a December 2, 1997 letter from you at W.R. Grace
13 to an Eileen McCabe at Mendes and Mount?

14 MS. DeCRISTOFARO: Objection, Your Honor, relevance.

15 THE COURT: That's not what Exhibit 95 is.

16 MR. HUGHES: That's not what I have either.

17 THE COURT: So, let's start with that.

18 (Pause)

19 THE COURT: Is this a substitute 95?

20 MR. BERNICK: It is I think 95, PP-95.

21 THE COURT: All right.

22 MR. BERNICK: It was not actually in the binder.

23 THE COURT: One second, please. I want to take the
24 other one out so I don't --

25 MS. DeCRISTOFARO: Your Honor, may we have a copy?

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Hughes - Direct/Bernick

247

1 THE COURT: Yes.

2 MR. BERNICK: Exhibit 95. You have all the Plan
3 Proponent exhibits.4 Q Mr. Hughes, is this a December 2, 1997 letter from
5 yourself to an Eileen McCabe and Mendes and Mount?

6 A Yes, it is.

7 Q And did you write that in connection with consent to
8 settlement rights that their client had?

9 MS. DeCRISTOFARO: Objection, Your Honor.

10 MS. McCABE: Your Honor, may I -- if I could just
11 note an objection and maybe clarify what client --

12 THE COURT: Please state your name.

13 MS. McCABE: I'm sorry, Eileen McCabe from Mendes and
14 Mount, clarify what client.15 THE COURT: You want to take a look at the exhibit?
16 You can take a look at the exhibit if you need to.17 MS. McCABE: I just think it was because I represent
18 a different client here, Your Honor.

19 THE CLERK: You have to use the microphone.

20 MS. McCABE: I represent a different client here,
21 Your Honor, and I believe that was for London Market Insurers.22 MR. BERNICK: I believe that it is for the London
23 Market Insurers.

24 THE COURT: Okay.

25 MS. McCABE: So, I want to make sure we're not --

Hughes - Direct/Bernick

248

1 there's no misunderstanding on the record that it was to AXA
2 Belgium as successor to Royal Belge.

3 THE COURT: All right.

4 MR. BERNICK: They would know best what Eileen McCabe
5 was doing in connection with this issue. All I'm really going
6 to ask the witness is for his knowledge about the document.

7 Q First of all, is this a letter that you wrote on or about
8 the date appears to Mendes and Mount in connection with consent
9 to settlement right?

10 A Yes, it was.

11 MR. BERNICK: Okay. So, we would offer it, Your
12 Honor.

13 MS. DeCRISTOFARO: Your Honor, objection to relevance
14 and to the questioning. London Market Insurers has a
15 settlement on file. They're not a participant and that letter
16 can't be offered against anybody else.

17 MR. BERNICK: Your Honor, it absolutely can be
18 offered for purposes of establishing that the carriers that had
19 consent to settlement rights did not assert them. It doesn't
20 make any difference if they've settled or not. The question
21 is, what was the practice? And this goes to the proposition of
22 whether the plan has an adverse effect, as they have claimed
23 that it does, to the extent that the right to the consent to
24 settlement right is affected. What we're demonstrating is that
25 they never exercised their right to refuse the consent prior to

Hughes - Direct/Bernick

249

1 the Chapter 11 being filed. This goes to that and they can't
2 by -- because another party has settled keep the evidence out
3 from the Court's consideration.

4 MS. DeCRISTOFARO: Your Honor, it would be relevant
5 to the issue of whether London consented prior to -- under
6 their settlement agreement and the terms of their settlement
7 agreement and communications between them and Grace. I don't
8 see how that's at all admissible vis-a-vis any other party.
9 London is not before the Court. It's directed to London. It's
10 regarding their contract and their consent and whether they
11 exercised them.

12 MR. BERNICK: The question is whether the plan -- how
13 the plan compares with the pre-petition practice for
14 settlements in the tort system and for the consent of the
15 carriers. And it doesn't have to be demonstrated carrier by
16 carrier, case by case. This was the way that things were
17 handled, and it is a fact of how the system was operating. And
18 through some special circumstance that relates to their
19 clients' situation, they can bring it out on cross. The
20 evidence is still admissible.

21 MR. BROWN: Your Honor, Mr. Bernick continues to use
22 the imprecise term carriers and insurers. It's muddying the
23 waters in terms of who he is talking about. And in the context
24 of this case where the plan proponents are seeking to bind the
25 reimbursement insurers to the TDPs but not the other insurers,

Hughes - Direct/Bernick

250

1 it's important that he be clear in his language.

2 THE COURT: All right. The objection with respect to
3 being clear in the language is sustained, because otherwise I
4 think the record will not be clear. The objection to relevance
5 is overruled. I think Combustion Engineering sets forth the
6 principle that pre-petition practice is relevant to post-plan
7 practice and, therefore, the objection is overruled.

8 MR. BROWN: Your Honor, it's relevant as to whom?

9 THE COURT: Well, I'm going to require the phrasing
10 to be restated. I sustained that objection. But, the
11 relevance objection, once this is -- well, I guess you're
12 right. I guess I need to know to whom first. Can you restate
13 the question for me, Mr. Bernick.

14 MR. BERNICK: Yes.

15 Q Does this document relate to a dialogue that you had with
16 the Mendes and Mount people to -- it was in relationship to the
17 London Market Carriers?

18 A Yes, it is.

19 MS. McCABE: Objection, Your Honor. I feel like the
20 record is going to be unclear, Your Honor. That's pursuant to
21 a settlement agreement. I mean, I can bring it out on cross
22 but it's pursuant to a settlement agreement that was entered in
23 1996 between Grace and London Market Insurers. And just to
24 address one point -- I have to address this point -- Mr.
25 Bernick raised, he said there was a waiver of, or lack of

Hughes - Direct/Bernick

251

1 consent, there is no foundation there was a lack of consent or
2 waiver of consent or something on that part, but --

3 MR. BERNICK: They didn't exercise their -- they
4 didn't withhold the consent. It's so simple.

5 MS. McCABE: Well, there is a difference there as to
6 whether we withheld consent or didn't exercise any rights.
7 But, putting that aside, putting that issue aside, Your Honor,
8 I think the bigger issue is that these letters were written in
9 the context of the settlement agreement with the London Market
10 Insurers that was executed in 1996. And just following up on
11 my co-counsel's objections, I think it would be improper or I
12 would object on grounds of relevance as to AXA Belgium, for
13 instance, Your Honor, that this was a course of conduct with
14 all of the insurers.

15 THE COURT: I don't --

16 MR. BERNICK: I'm sorry, Your Honor.

17 THE COURT: -- think it shows a course of conduct
18 with all insurers. But, the witness has already testified that
19 he is not -- he doesn't recall a single reimbursement insurer
20 who objected. So, it's follow-up in that sense to the extent
21 that this is a reimbursement insurer. That's what I'm waiting
22 to hear, whether this is a reimbursement insurer.

23 BY MR. BERNICK:

24 Q Is this a reimbursement insurer?

25 A Yes, it is.

Hughes - Direct/Bernick

252

1 THE COURT: Okay. Then, the objection to relevance
2 is overruled. It seems to me that at this point, it is
3 relevant.

4 MR. BERNICK: Okay.

5 Q So, do you recall -- let me just direct your --

6 MR. BERNICK: First of all, I offer the document,
7 Your Honor.

8 MS. McCABE: And again, we maintain our objection,
9 Your Honor.

10 THE COURT: What's the relevance of the document as
11 opposed to the testimony?

12 MR. BERNICK: Well, the document bears out his
13 testimony. It confirms his testimony from recollection. We're
14 talking about something that took place ten years ago.

15 THE COURT: He hasn't denied that he had any
16 recollection error or problem.

17 MR. BERNICK: But, that's -- it goes to --

18 MR. BROWN: Your Honor, the document also goes to
19 notice.

20 THE COURT: Of what?

21 MR. BROWN: Notice of a settlement that Grace
22 informed its reimbursement insurers, namely Lloyds of London,
23 London Market Insurers, about a settlement. And the testimony
24 I believe will establish (a) that that notice was provided to
25 the London Market Insurers and to the other reimbursement

1 insurer listed on the CC line, and (b) that notwithstanding Mr.
2 Hughes' notification that, I'm going to settle these cases for
3 \$50 million, there was no objection by the reimbursement
4 insurers to that settlement.

5 THE COURT: He's already testified to that effect. I
6 don't see the relevance of the document itself.

7 MR. BERNICK: The relevance is not at all an issue.
8 The witness has testified to what the practice was and he is
9 going to -- and he testified I believe and he will testify
10 further that as true with respect to this particular carrier
11 who is a reimbursement carrier. If Your Honor is indicating
12 that to offer a document that confirms his oral testimony is
13 cumulative, I can understand that. But, it seems to me that --

14 MR. COHN: Your Honor, then we object that it's
15 cumulative.

16 MR. BERNICK: That's about the mileage here.

17 MS. DeCRISTOFARO: Your Honor, we --

18 THE COURT: It is cumulative, but that's not -- that
19 is not the problem.

20 MR. BERNICK: Your Honor, somebody has got to take
21 control of --

22 THE COURT: And I am, so all of you stop.

23 MR. BERNICK: Okay. So, if Your Honor's
24 determination is that this is cumulative --

25 THE COURT: Is that stopping?

1 MR. BERNICK: Oh, I'm sorry. I thought I was talking
2 when I was interrupted.

3 THE COURT: This document talks about a settlement
4 which, Mr. Bernick, you have been continually objecting to as
5 not leading to relevant or admissible evidence. So, what makes
6 this document any different than any other settlement agreement
7 that the debtor entered into, the document itself?

8 MR. BERNICK: The document itself is relevant. It's
9 the reason that the witness' testimony just now is relevant,
10 which is it goes to the proposition that people were notified
11 that -- in particular the London Markets were notified through
12 their counsel and they did not exercise their rights to refuse
13 due -- did not exercise their rights to refuse to the consent
14 to a settlement. So, the document is just as relevant as the
15 witness' testimony on the same subject.

16 Your Honor, we are offering it precisely because of
17 the fact that pre-petition settlement practices in fact are
18 relevant. Our position is not that settlements generally don't
19 come in. Our position is that they can come in depending upon
20 the purpose for which they are offered. This is offered to
21 establish a fact. The fact is that this particular insurer
22 like others did not refuse to consent to settlements.

23 MR. BROWN: Your Honor, again --

24 THE COURT: Okay, but this document does not
25 establish that fact. It is a document by Grace asking the

1 London Market Insurers --

2 MR. BERNICK: Yes.

3 THE COURT: -- if they wish to participate in the
4 settlement. It does not substantiate that they did not or did
5 participate.

6 MR. BERNICK: That's my next question, is that after
7 he sent the letter out did Mendes and Mount get back to him and
8 say, oh, no, we don't want you to proceed with the settlement?
9 That --

10 THE COURT: That's a relevant question.

11 MR. BERNICK: Yes --

12 MS. DeCRISTOFARO: Your Honor, if we may, the idea is
13 it provides notice or it provides behavior, conduct. This
14 letter only goes to the behavior and conduct of London under
15 their settlement.

16 THE COURT: Well, there are copies. I don't know who
17 the copies are to, Ms. DeCristofaro. But, assuming for now
18 that it's addressed to counsel for London, then I can accept
19 that that's who at least the intent is for.

20 MS. DeCRISTOFARO: And then -- but London --

21 THE COURT: And it goes to the conduct of London.

22 But, I don't think the Combustion Engineering limits itself to
23 the fact that the pre-petition practice is -- has to be varied
24 on an insurer by insurer basis. If in fact there is some
25 variation, then that can be brought out in cross examination.

1 I think Combustion stands for the proposition that one of the
2 things that the debtor can do in support of it's plan is
3 establish that the pre-petition practice is carried out in the
4 plan, and it is relevant to that issue.

5 MS. DeCRISTOFARO: Your Honor, I think the Combustion
6 Engineering issue really goes to a practice of handling the
7 claims and this is not about that. This is about the terms of
8 a settlement agreement. Now, whether someone decides to object
9 to a settlement agreement under their contractual rights is
10 different than what Combustion was getting at, which is you set
11 up a claims facility and --

12 THE COURT: The issues were different in Combustion,
13 but the premise -- the precept that the Court announces which
14 is that the debtor can substantiate its pre-petition practice
15 to show that the plan comports with it I don't think is limited
16 to claims history. To the extent that this document is going
17 to substantiate that there was a pattern -- and I don't know
18 that it is, but I'm -- for example, it's relevant to the issue
19 of whether or not there was a pattern by insurers generally not
20 to object to debtor settlements. And if that is the case, then
21 the insurers have a different issue in terms of showing that
22 the plan violates their rights than perhaps otherwise. So, I
23 think Combustion is relevant in that sense. I think this
24 document goes to that point. It is cumulative. I will admit
25 it only for the purpose of the fact that it is cumulative and I

1 will give it such weight as I deem it appropriate, and I don't
2 deem it appropriate to weigh it much. It's the witness'
3 testimony that is substantial here.

4 MS. DeCRISTOFARO: Your Honor, just again to
5 follow-up on this.

6 THE COURT: Please, how many times do I have to rule,
7 really?

8 MS. DeCRISTOFARO: Your Honor, I just wanted to
9 clarify the same distinction Mr. Brown was ruling. That
10 discussion relates to reimbursement insurers and not generally
11 to unsettled --

12 THE COURT: That was the question, yes.

13 MS. DeCRISTOFARO: Unsettled carriers.

14 THE COURT: Yes.

15 UNIDENTIFIED SPEAKER: Your Honor?

16 THE COURT: Can everybody agree that the question
17 right now related to reimbursement insurers? That was the
18 question. I asked Mr. Bernick to restate it and he did.

19 MR. BERNICK: Yes, that is the question.

20 MR. BROWN: Your Honor, could we agree that this
21 entire line of questioning is directed at the reimbursement
22 insurers --

23 THE COURT: Well, you have to ask the question or
24 that --

25 MR. BROWN: -- because it's not relevant to anyone

Hughes - Direct/Bernick

258

1 else?

2 THE COURT: You have to ask Mr. Bernick that. I
3 don't know what the intent is. Mr. Bernick?4 MR. BERNICK: I don't think that -- the question is
5 exactly as it is on the face. We don't have any obligation.
6 It's not part of proper court practice every time a question is
7 asked saying, well, is his whole line of questioning limited to
8 this or that? I don't know what the whole line of questioning
9 is. I suspect --

10 THE COURT: The answer is no. He'll just have to --

11 MR. BROWN: Could I ask for a proffer of its
12 relevance?

13 MS. DeCRISTOFARO: We'll object, Your Honor.

14 THE COURT: Folks, he will state each question with
15 respect to what group of insurers he is asking the question
16 about and then we will know. Let's go, Mr. Bernick.

17 MR. BERNICK: Thank you very much.

18 BY MR. BERNICK:

19 Q After you --

20 MR. BERNICK: Is the document admitted? I think Your
21 Honor accepted it for the limited purpose.

22 THE COURT: I did.

23 MR. BERNICK: Okay.

24 THE COURT: Well, I accepted it.

25 MR. BERNICK: Yes.

Hughes - Direct/Bernick

259

1 THE COURT: And I said I'd give it such weight as I
2 think it deserves.

3 MR. BERNICK: Right.

4 Q Mr. Hughes, after you sent this letter did you ever
5 receive a response back saying that there was not an agreement
6 that the settlement could go forward from the representatives
7 of the London Market Insurers -- reimbursement insurers?

8 A I may have had a conversation with the representative from
9 London Market, but it definitely was not to the effect that
10 they were withholding their consent. The settlement went
11 through and it was reimbursed pursuant to our agreement.

12 Q Okay. Next subject. I want to talk a little bit about
13 non-product cases, that is lawsuits that were filed that were
14 non-product lawsuits. Were there, in fact, non-products
15 lawsuits that were filed and settled by Grace pre-petition?

16 MS. DeCRISTOFARO: Objection, Your Honor. The
17 question calls for a legal conclusion.

18 THE COURT: Sustained.

19 Q Were there -- did Grace -- did you within the context of
20 your work distinguish between lawsuits that came in that pled a
21 claim for product liability and lawsuits that came in that pled
22 conduct or underlying facts that spoke in negligence or
23 intentional tort?

24 MS. DeCRISTOFARO: Objection to the form.

25 THE COURT: Overruled.

Hughes - Direct/Bernick

260

1 Q You look confused. Did I ask a --

2 A No, no. I mean, I guess I distinguished between them but
3 --

4 Q Well, what distinction did you make, if any?

5 A Well, products liability claims were, you know, involved
6 claims that -- finished products, manufactured and sold by
7 Grace, asbestos containing products, somehow defective and that
8 as a result, people were exposed to asbestos and that these
9 exposures resulted in asbestos-related disease.

10 Q Okay. I'll move onto something else. Mr. Finch has got
11 an urgent desire to cover this and I'm happy to defer to him.
12 Last subject, and that is the claims that have been made by
13 some of the objectors here. Are you familiar with the claims
14 that have been made by some of the objectors here, and I'm
15 going to go through a list here, I'm going to ask you about
16 Maryland Casualty, State of Montana, BNSF, Fireman's Fund and
17 Seaton, One Beacon. Are you familiar with the claims that
18 have been made by those listed objectors in this case? That is
19 the claims that they want to press against Grace or against
20 others?

21 A Yes, I am.

22 Q I want to begin by, first of all, covering the underlying
23 claims that prompt their claims and this time when I draw them
24 out in deference to Mr. Lewis, who is still there, we're going
25 to flatten the mountain and then we're going to come down -- I

Hughes - Direct/Bernick

261

1 didn't get that one. Okay. And we have Rainy Creek Road that
2 stands around Zonolite Mountain, and comes down to the
3 screening plant and there's a little conveyor that goes across
4 the river and the famous BNSF railroad platform and we have a
5 little train that goes off on its way; goes to places like
6 Scotts; goes to places like Grace, where the product is
7 expanded and then used and buildings such as the buildings on
8 which Mr. Edwards worked and on which the other claimants
9 represented by the Reaud, Morgan & Quinn firm, worked. Okay.
10 So, BNSF and Zonolite Mountain, okay.

11 Are you familiar with the claims that have been
12 asserted against Maryland Casualty that according to them, give
13 rise to claims that they are pressing in this case?

14 A Yes, I am.

15 Q What is the -- from what underlying facts do the Maryland
16 Casualty claims emanate, historically?

17 A Well, Maryland Casualty was Grace's general liability
18 insurance carrier from, I think 1963 to 1973. It was actually
19 it's carrier before then, but with respect to the Zonolite
20 business, it started when Grace acquired the Zonolite business
21 in 1963. In connection with its insurance coverage for Grace,
22 Maryland Casualty, as many insurance carriers, it provided
23 consulting services, industrial hygiene services, and some of
24 those types of services were provided with respect to the
25 Zonolite employees up at Libby and in the lawsuits that were

Hughes - Direct/Bernick

262

1 filed against Maryland Casualty, I believe there may have been
2 one or two before we filed bankruptcy, but primarily, I think
3 post Grace filing, the people who were exposed to asbestos,
4 former employees of Grace and I think to some degree, family
5 members who, again, the same types of exposures, same claims,
6 that would underlie the Libby claims against Grace, on the
7 theory that Maryland Casualty, by providing these kinds of
8 services, had created a duty between them and the Libby
9 employees and the family members and that by not taking certain
10 steps to reduce the exposure after conducting this work, had
11 breached the duty and that breach resulted in their developing
12 asbestos-related diseases.

13 Q So, these are, essentially, the same kind of bodily
14 injuries, that they are alleging against Grace?

15 A In many cases, the same claimants, but certainly, the same
16 types of claims.

17 Q Being now alleged against Maryland Casualty because of its
18 historical involvement at the site, fair?

19 A Yes.

20 Q And, then what now, claim, as you understand it, has
21 arisen in the mind of Maryland Casualty out of its exposure,
22 that is, what is the follow-on claim that Maryland Casualty is
23 making, as you understand it?

24 A Well, in the 1990s, as a result of their providing
25 comprehensive, general liability insurance coverage that was

Hughes - Direct/Bernick

263

1 available for asbestos claims to Grace, they entered into
2 settlement agreements with Grace, settling that insurance and
3 in those agreements, there was indemnification language which
4 said that to the extent claims arising out of the insurance
5 coverage, for asbestos related claims anyway, that Grace would
6 indemnify them for these types of claims and there's an
7 argument that they have and it's alleged that these claims
8 followed in the scope of that indemnification and, therefore,
9 Maryland Casualty has a claim back against Grace.

10 Q Arising out of the original bodily --

11 A Again, going back to the original bodily injury claims
12 involving the Libby employees and family members and community.

13 Q State of Montana. Are you familiar with claims that the
14 State of Montana has made or is making in this case, or wishes
15 to make in this case?

16 A Yes, I am.

17 Q Tell us what the historical backdrop of those claims is.

18 A Well, the State of Montana, particularly the State of
19 Montana, Department of Public Health, starting as early as the
20 operation of the mine, but I think the first specific reference
21 to asbestos came in the 50s, provided -- did inspections
22 pursuant to their authority as the state agency regulating
23 these kinds of activities, at the Libby, Montana site and,
24 again, the allegations and the complaints that have been made
25 against the state, it's my understanding, allege that the state

Hughes - Direct/Bernick

264

1 by undertaking this work, created a duty between they, the
2 state, and the Libby employees and family members, that by not
3 taking certain steps to communicate what they learned about the
4 conditions up at the mine and mill, breached this duty and,
5 therefore, they were liable to the Libby claimants for damages
6 for their asbestos related diseases.

7 Q So, another bodily injury underlying tort?

8 A Again, the same basic tort, same exposures, same work
9 sites.

10 Q But what now is the State of Montana's claim? We've got
11 an indemnity with respect to -- is there written indemnity that
12 was being invoked by Maryland Casualty? What's the basis,
13 what's the asserted basis for the action over by the State of
14 Montana?

15 A Well, the State of Montana, I don't believe it's a
16 contractual indemnification, I think it's a common law
17 contribution and indemnification claim that they've asserted in
18 these complaints, essentially arguing, or the proofs of claim
19 against Grace, that these were really Grace's liability and
20 they're standing in Grace's place and, therefore, they should
21 be entitled to reimbursement from Grace under common law
22 contribution and indemnity.

23 Q Okay. Now, what about BNSF? Has BNSF faced also bodily
24 injury claims arising out of the operations of that were
25 associated with the Libby mine?

Hughes - Direct/Bernick

265

1 A Yes, it has.

2 Q And, so, we've got, again, they're arising out of bodily
3 injury claims against BNSF?

4 A That same basic tort, personal injury related to asbestos
5 exposure, in many cases the same claimants. BNSF, as I think I
6 testified earlier, or last week, was the -- operated the
7 railway and a right-of-way on the other side of the Kootenai
8 River, from the screening plant and there was a loading and
9 then in connection with that operation and the agreement under
10 which Grace operated the loading station, and the conveyor
11 across the right-of-way, there was indemnification language in
12 that agreement, which essentially said that Grace would
13 indemnify them for, BNSF for any damages incurred as a result
14 -- arising out of the operation of the loading dock or station,
15 or whatever it's called.

16 Q And, that's now a written indemnity that's being invoked?

17 A Yes.

18 Q Let's talk about Scotts. Scotts was here in the case.

19 Has Scotts asserted claims against -- has Scotts, itself,
20 experienced claims that have been brought against it?

21 A Yes, it has.

22 Q And tell me the nature of those claims.

23 A Well, Scotts --

24 MR. BROWN: Objection, Your Honor. Could we have
25 some foundation here, that this witness actually has some

Hughes - Direct/Bernick

266

1 familiarity with it?

2 THE COURT: Yes.

3 Q Do you have familiarity with it?

4 A With claims against Scotts?

5 Q Yes.

6 A Yes, I do.

7 Q Okay. And is that part of your job?

8 A Yes. I learned that in my capacity as an attorney for
9 Grace.

10 Q Okay. So, Scotts, as we know, well, let me just ask. You
11 know a lot of things that we now have to introduce here. Is
12 there insurance that is being -- that Scotts was seeking to get
13 access to in connection with the bodily injury claims that were
14 being brought against it?

15 A Yes. Scotts was a large customer, vermiculite customer of
16 Grace and at some point in the context of these bankruptcy
17 proceedings, or outside the bankruptcy proceedings, they
18 received some personal injury lawsuits from people who alleged
19 exposure to their products that contained vermiculite and
20 attempted to access Grace insurance coverage on the theory that
21 they were a named insured or, that may not be the appropriate
22 term of art, under I think the vendors endorsement, because
23 they sold our products.

24 Q Okay.

25 A Or they sold products that incorporated our vermiculite in

Hughes - Direct/Bernick

267

1 them.

2 Q Which insurance was implicated by the exposures that had
3 taken place at Scotts?

4 A The products -- I mean -- the CGL policies, you know. were
5 our primary carriers and other insurance carriers.

6 Q Okay. Seaton, One Beacon is obviously present and active
7 in this proceeding. What relation, if any, is there between
8 the issues that Seaton One -- the claims that Seaton, One Beach
9 is concerned about and has expressed its concern and Scotts?

10 A I think they were one of the insurance carriers that
11 Scotts was arguing that the coverage applied to Scotts claims.

12 Q Okay. So, the claims that Seaton, One Beacon wishes to
13 assert, in part, emanate from the underlying bodily injury
14 claims of Scotts?

15 A Yes.

16 Q Now, we've also heard from Kaneb. Are you familiar with
17 the situation involving Kaneb?

18 A No, I'm not.

19 Q Okay. So, we'll put that in the data box. What about the
20 Edwards case, are you familiar with the Edwards case?

21 A Yes, I am.

22 Q And, what was the Edwards case? What was and is the
23 Edwards case?

24 A The Edwards case was a group of five cases that Grace and
25 Pittsburgh Corning tried to verdict in Beaumont, Texas, in, I

Hughes - Direct/Bernick

268

1 think, early 2000, that resulted in a compensatory and punitive
2 damage award, a substantial compensatory and punitive damage
3 award against both companies.

4 Q So, that's a bodily injury award?

5 A Yes, it was.

6 Q Now, we've heard about Fireman's Fund. What, if any,
7 relationship is there between this personal injury award and
8 the issues that relate to Fireman's Fund?

9 A Well, when we lost the case, and decided to appeal, under
10 the Texas law, we had to obtain a bond in order to bond the
11 judgment, and we went out and obtained an appeal bond, in the
12 amount, I think, I believe it was \$43 million, which was the
13 amount of the full compensatory damages, joint and several
14 compensatory damages, the Grace specific punitive damage award
15 and a year of interest which is what was required under Texas
16 law.

17 Q Okay. And that bond came from whom?

18 A It came from Fireman's Fund.

19 Q Now, there's also been discussion of Long Acre. Does Long
20 Acre also have a relationship to an underlying bodily injury
21 claim?

22 A Yes, it does.

23 Q And just explain what that is, what that relationship is.

24 A Well, Long Acre purchased the claims of National Union and
25 National Union had issued bonds, surety bond, which was to

Hughes - Direct/Bernick

269

1 guarantee Grace's performance under a settlement agreement with
2 the law firm Reaud, Morgan and Quinn, that we entered into in,
3 again, I think it was -- this was September or October of 2001.
4 Under the terms of -- in the negotiations, the plaintiff's
5 lawyer insisted that we guaranteed payment through some third
6 party and we used the surety bond as the vehicle to meet our
7 obligation for a guarantee under the agreement. The agreement
8 called for four specific payments. October, I think, of 2000,
9 January of 2001, January of 2002 and January 2003. After we,
10 you know, filed bankruptcy, we didn't make the last two
11 payments.

12 Q So, here you have also a bodily injury underlying claim.

13 A Right.

14 Q Out of that arises a settlement.

15 A Yes.

16 Q And out of the settlement arises the need for the bond?

17 A Yes.

18 Q And the bond is now held by Long Acre.

19 A Correct, the claim.

20 MR. BERNICK: Yes, okay. I think that's it, Your
21 Honor, I'd pass the witness Oh, Mr. Finch had something he
22 wanted to cover.

23 MR. FINCH: Nathan Finch for the Asbestos Claimants
24 Committee, Your Honor.

25 THE COURT: Yes.

J&J COURT TRANSCRIBERS, INC.

Hughes - Cross/Finch

270

CROSS EXAMINATION

1 BY MR. FINCH:

2 Q Mr. Hughes, do you still have Exhibit 95 in front of you?

3 A Yes, I do.

4 Q On the second page of Exhibit 95, there are a couple of
5 cc's, do you see that?

6 A Yes.

7 Q One of them is a gentleman named Jeffrey Genereux.

8 A Yes.

9 Q Do you know who that is?

10 A Yes, I do.

11 Q Could you tell the Court who Mr. Genereux is?

12 A Mr. Genereux was a employee of Alan Gray & Associates,
13 which is an insurance consulting and auditing firm that handled
14 the auditing and administration of the reimbursement agreement
15 between AIG and Grace.16 Q Was Exhibit 95 the only piece of correspondence you ever
17 sent to Ms. McCabe or Mr. Genereux announcing Grace's intent to
18 settle asbestos personal injury claims?

19 A No, I sent them routinely.

20 Q How frequently would you send them letters announcing
21 Grace's intent to settle asbestos personal injury claims?

22 A Frequently.

23 Q Would the correspondence fill up boxes?

24 A Yes.

1 MS. DeCRISTOFARO: Objection, Your Honor, relevance.

2 Q Would it be at least on a daily basis, or a weekly basis?

3 A Yeah.

4 MS. DeCRISTOFARO: Objection.

5 THE WITNESS: I mean -- the

6 MS. DeCRISTOFARO: Your Honor, if I may, I don't want
7 to -- but we do object to the whole idea of --

8 THE COURT: I can't hear you Ms. DeCristofaro.

9 MS. DeCRISTOFARO: I'm sorry. We do -- the course of
10 conduct between Grace and London we object to as not admissible
11 as to the other insurers.

12

13 THE COURT: Yes. You need to state the same --

14 Q Okay. With the same limitations, talking about
15 reimbursement insurers, was AIG a party to a reimbursement
16 insurance agreement?

17 A Yes, it was.

18 Q Okay. How frequently did you correspond with
19 representatives of reimbursement agreement insurers, announcing
20 Grace's intent to settle asbestos personal injury claims?

21 MR. COHN: Objection, Your Honor, relevance and
22 especially with respect to AIG. As I understand, they had a
23 reimbursement agreement that was fundamentally different from
24 those of many others and I would ask that a foundation be laid
25 as to what AIG's settlement agreements relevance is to this.

1 THE COURT: What's the relevance?

2 MR. FINCH: Your Honor, it's another reimbursement.

3 There were ten reimbursement agreements as I understand it.

4 Two of them, only two of them had any kind of consent to
5 settlement rights at all. One was London and AIG had an
6 agreement that was not a consent to settlement but it had a
7 right to associate, or at least to participate in Grace's
8 strategy for resolving claims. I think the fact that the
9 London Market insurers, Lloyds of London and AIG, never
10 objected to Grace's course of dealing with asbestos claimants,
11 is relevant to the historical practices of what Grace did and
12 the reimbursement insurers not being harmed by the practices in
13 this plan.

14 MS. DeCRISTOFARO: Your Honor, if it's offered
15 against AIG or London, that would be correct, but they're --

16 MR. FINCH: I believe Your Honor has already ruled on
17 this with respect to the --

18 THE COURT: Well, okay. Two out of ten doesn't
19 necessarily substantiate a practice. So, I'm willing to accept
20 the evidence. It seems to me that it's relevant as to what
21 Grace's historical practice was, but if I just understood it,
22 two out of ten having this consent to settlements in the first
23 place, doesn't necessarily substantiate that there is a
24 practice, especially when there are a total of ten and eight
25 don't have them.

1 MR. FINCH: The point, Your Honor, is that the
2 findings that we're seeking in the plan do not impinge upon the
3 rights of the reimbursement agreement insurers and this is the
4 course of dealing with Grace and the claimants and the TDP and
5 the settlement criteria in the TDP don't --

6 THE COURT: Okay. So the TDP is going to essentially
7 say that there is no consent, but you're going to say that the
8 reimbursers, eight of the ten, had no right to consent in the
9 first place and the other two who had it didn't exercise it.

10 MR. FINCH: Correct, that's the point.

11 THE COURT: And, that's what this is relevant to.

12 MR. FINCH: That's the point of this evidence.

13 THE COURT: All right. It's relevant to that point.

14 Q Okay. My question, I believe, Mr. Hughes, is how
15 frequently did you inform the representatives of Lloyds of
16 London and AIG, who had reimbursement agreements as to Grace's
17 intent to settle asbestos personal injury claims?

18 A Frequently.

19 Q As part of your role as inside counsel for Grace, did you
20 have to become familiar with the general facts in evidence in
21 cases that Grace would actually take to verdict in the tort
22 system?

23 A Yes.

24 Q Are you familiar with a case involving a man named Braxton
25 Colley?

1 A Yes, I am.

2 Q Describe, just very briefly, what that case was about and
3 what the result of it was.

4 A It was a, again, asbestos personal injury case, I believe,
5 in the Circuit Court of the City of St. Louis. Mr. Colley
6 worked at a McDonnell-Douglas facility. He alleged he was
7 exposed in the course of his work to Monokote MK3 and there was
8 a substantial verdict. I don't recall the amount of the
9 verdict. It was settled for a different amount, but it was in
10 the 3 to \$4 million range, I believe.

11 Q And, the verdict was in excess of a couple million
12 dollars?

13 A Yes, it was.

14 Q Did you regard that as a strong asbestos personal injury
15 claim or a weak asbestos personal injury claim before Grace
16 took it to trial?

17 A I think we considered it a strong case for a variety of
18 factors, but --

19 Q Are you familiar with a Norsworthy case?

20 A Yes, I am.

21 Q Was that a non-malignant case that was tried in Texas?

22 A Yes, it was.

23 Q Did that also result in a verdict in the multimillion
24 dollar range against W.R. Grace?

25 A Yes, it did.

1 Q What, if any, ability, did W.R. Grace have when it was in
2 the tort system, to limit or cap the amount of judgments
3 against it in cases that went to verdict?

4 A We didn't have that -- except to the extent it was limited
5 by law, but I guess the answer to your question is, we didn't
6 have any ability to limit it.

7 Q Did you become personally familiar with -- as part of your
8 job duties as defending Grace in asbestos litigation, did you
9 keep track of verdicts entered against not only Grace, but
10 other defendants?

11 A Yes.

12 Q Did you become familiar with the fact that there were
13 judgments in asbestos personal injury cases that exceeded \$10
14 million?

15 A Yes.

16 MR. COHN: Objection, foundation.

17 THE COURT: He said that he kept track of the
18 verdicts in other cases, so I think that is the foundation,
19 although I don't have any specifics.

20 MR. COHN: But, he has no firsthand knowledge, Your
21 Honor.

22 THE COURT: That's true.

23 Q How did you become familiar with verdicts entered in other
24 cases?

25 A Well, I was -- there were publications, legal specific

1 publications geared towards the asbestos litigation, which
2 reported on verdicts in the asbestos litigation and as an
3 attorney working and evaluating claims, I kept up with those
4 kinds of publications. I also was personally familiar with a
5 lot of lawyers who were involved, both defense and plaintiffs
6 lawyers in cases around the country.

7 MR. FINCH: Your Honor, at the -- well, let me back
8 up.

9 Q Mr. Hughes, did Grace ever, prior to the time it went into
10 bankruptcy, resolve cases with people who were either employees
11 or invites onto Grace owned premises?

12 A Yes, we did.

13 Q And did you do that with respect to people who were
14 outside the State of Montana?

15 A Yes, we did.

16 Q Are you familiar with the case of a man named Dayton
17 Prouty?

18 A Yes, I am.

19 Q What generally was that case about?

20 A Dayton Prouty, Jr., the plaintiff, was a veterinarian in
21 Corpus Christi, Texas, whose father, Dayton Prouty was an
22 executive in the 40s, 50s and 60s for the Zonolite Company.
23 And, Dr. Prouty came down with mesothelioma in the late 90s.

24 Q And, was he someone who was -- asserted a claim against
25 Grace based on -- first of all, where was he -- where did he

1 allege that he was exposed to Grace asbestos?

2 A Well, he claimed that during the years that when he was a
3 young man and a boy and he lived with his parents, he would on,
4 you know, Saturday afternoons, or whatever, go into the office
5 with his father, in the office. His father worked at an office
6 that was in the Dearborne, Michigan Zonolite expanding plaint.

7 Q And so, Zonolite was Grace's predecessor, that was a Grace
8 owned place?

9 A Yes.

10 MR. LEWIS: Hold on just a second. I don't have
11 access to a mike back there, but these questions, he's asking a
12 lot of leading questions, he's getting close to the mark now.
13 I'd like him to stop asking leading questions. Should I stand
14 here and object when he does it?

15 THE COURT: No. Please stop asking leading
16 questions.

17 MR. FINCH: I'll stop the leading, Your Honor. I was
18 trying to get through this quickly. Mr. Hughes, do you have
19 Plan Proponent's Exhibit 5062 and 5063? I think it's in front
20 of you. May I have the ELMO, please.

21 THE COURT: What tab is it?

22 MR. FINCH: It's a slide. Front pocket, Your Honor.

23 THE COURT: Thank you.

24 Q Mr. Hughes, can you identify 5062 and 5063?

25 A Yes.

Hughes - Cross/Finch

278

1 Q Leaving aside the title, did you help prepare these two
2 exhibits?

3 A Yes.

4 Q Can you describe for the Court how you went about
5 preparing these exhibits?

6 A Well, I -- based on my experience and some information
7 that we maintain in the case management system, Grace's in-
8 house database for personal injury claims, I identified cases
9 that had been -- asbestos personal injury cases that had been
10 brought by claimants outside of Libby who had either worked at
11 a Grace facility or, you know, were exposed in connection with
12 a Grace operation, an expanding plant, and these lists compile
13 those cases.

14 Again, it's limited and there are probably others,
15 but these are a representative sample of those kinds of cases.

16 Q Now, these basically -- all this information comes out of
17 Grace's claims management database which is in evidence as Plan
18 Proponents' Exhibit 7?

19 A Yes.

20 MR. LEWIS: Your Honor, I think that contradicts the
21 witness' testimony. He also said he got some information
22 elsewhere, as I recall.

23 THE COURT: He said, based on his experience and
24 information from the in-house, personal injury database.

25 THE WITNESS: Yeah, I meant from my -- well --

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1 Q What did you mean, Mr. Hughes by --

2 A I meant from my memory. That I, you know, I was familiar
3 with cases. If somebody had asked me the question, to put
4 together the thing, some of the information in the case
5 management system, a lot of it, there were a few of the cases
6 because they were, you know, serious cases like Dr. Prouty's
7 case, I knew from memory.

8 Q Your Honor -- and is it correct the information on here
9 was based on information either that was in your memory or in
10 the Grace historical claims database that's already in
11 evidence?

12 A Well, some of them came from --

13 Q Well, let me back up.

14 A Some of the information came from PIQs that were filed in
15 the bankruptcy, as I recall.

16 Q These are resolved cases. I'm just looking at Slides 2
17 and 3. 5062 and 5063.

18 A Oh, two and three, yes. These are resolved cases, these
19 came from the case management system.

20 MR. FINCH: Okay. We would offer Plan Proponents
21 Exhibit 5062 and 5063 as Rule 1006 summaries derived from
22 information in the Grace historical claims database.

23 MS. DeCRISTOFARO: I bet Your Honor could predict
24 what I'm going to say. Your Honor, we object to the extent
25 that they're offered to establish that these are non-products

1 personal injury. I noticed that they added the title
2 potential. In our view, there's certainly not a determination
3 to be made here, that they are non-products claims. There's
4 certainly not any information the Court could determine that.
5 We -- and it certainly can't be offered against any of the
6 insurers.

7 To the extent it's meant just simply to establish
8 that Grace alleges that there are potential claimed,
9 non-products claims elsewhere in the country, as not offered
10 against the insurers to prove it, to that extent I would not
11 object. As long as it's clear on the record.

12 MR. FINCH: It's only being offered for the latter
13 purpose, Your Honor. That's clear enough from the record.
14 It's only being offered to show that Grace and the plan
15 proponents have received claims from people who allege -- or
16 arising from Grace owned premises which could be non-products
17 cases. We are not offering this as against any insurance
18 companies and it certainly doesn't -- we're not asking the
19 Court to adjudicate as a matter of law or findings of fact or
20 anything else, whether these are or are not non-products cases.

21 THE COURT: Well, the whole chart is listed as Grace
22 non-product personal injury claims and something. Now, it's
23 not in evidence. Maybe the witness can substantiate what that
24 column means, but I don't understand the proffer if that's not
25 what it's for.

1 MR. FINCH: No, Your Honor -- Your Honor, resolved
2 Grace asbestos claims with potential non-products exposure --

3 THE COURT: Yes, and then the account name says Grace
4 non-products personal injury claims.

5 MR. SCHIAVONI: Your Honor, for Arrowood, I
6 understand Mr. Finch's proffer to be one that, he's offering
7 this for a specific fact pattern, with regard to whether or not
8 that triggers or constitutes a type of coverage, he's not
9 offering it for that, he's offering it for the fact pattern, as
10 I understand it, and I don't have an objection to that.

11 MR. FINCH: That's correct, Your Honor. And I would
12 be perfectly happy to strike the column, account name from the
13 exhibit.

14 THE COURT: Mr. Lewis.

15 MR. LEWIS: Your Honor, I have a more fundamental
16 objection. This is not a proper 1006 summary. I don't know
17 any law that would support a 1006 summary, based partly on a
18 witness' memory.

19 THE COURT: No, he's testified that these two pages,
20 5062 and 5063 were drawn from the information in the database,
21 not from his memory.

22 MR. LEWIS: No, he did not say that all the
23 information on these pages were in the database, and I don't
24 think they could be here.

25 THE COURT: Well, let me find out. Mr. Finch, can

Hughes - Cross/Finch

282

1 you lay the foundation for these two documents?

2 Q Mr. Hughes, other than account name, is all the
3 information shown on 5062 and 5063 come straight out of the
4 Grace asbestos claims database?

5 A Yes, it does.

6 THE COURT: So, submit a revised exhibit that
7 eliminates the account name and the offensive title, and then I
8 will take the revised exhibit. For now, I'll offer this one,
9 but understanding that the column called account name, on
10 Exhibits 5062 and 5063 is not admitted and that the caption is
11 only descriptive so we know what the exhibit is. And it has no
12 weight in terms of the evidence.

13 MR. FINCH: The caption is not being offered for any
14 probative value. The witness' testimony is what it is.

15 THE COURT: All right, okay. Let me make a note
16 please. All right, thank you.

17 MR. FINCH: I have one final set of questions, Your
18 Honor.

19 Q Mr. Hughes, in response to Mr. Bernick's questions, you
20 discussed the Edwards judgment, which is drawn quite nicely on
21 the chart over there. Do you recall that?

22 A Yes.

23 Q And, I believe you said that that was a case that involved
24 both punitive damages and compensatory damages?

25 A Yes.

Hughes - Cross/Lewis

283

1 Q What, if any, ability did Grace have when it was in the
2 tort system to completely eliminate the risk of punitive
3 damages in all cases?

4 A We didn't.

5 MR. FINCH: Pass the witness, Your Honor.

6 THE COURT: Anyone going to cross examine? Mr.
7 Lewis?

8 MR. LEWIS: Yes, Your Honor, thank you.

9 CROSS EXAMINATION

10 BY MR. LEWIS:

11 Q You have Dayton Prouty, do you recall that?

12 A Yes.

13 Q And you said he got his exposure sitting in his father's
14 office, who was a -- his father was a Grace executive?

15 A Yes, that was part of the exposure.

16 Q Where was that office located?

17 A That was in Dearborn, Michigan, in connection with the
18 expanding plant. It was actually in -- the office was right in
19 the plant, as I recall.

20 Q Are there other cases where family members, or even
21 workers were exposed to asbestos that resulted in asbestos
22 disease while sitting in an office, in a non-industrial
23 location?

24 MR. BERNICK: Objection. I think that's directly
25 contrary to what the witness just said, so it's not other. I

Hughes - Cross/Lewis

284

1 object to the form of the question.

2 MR. FINCH: And, again, there's an objection --

3 THE COURT: The objection is sustained to the word
4 other.

5 MR. LEWIS: Fair enough.

6 THE WITNESS: Could you repeat the question, please?

7 MR. LEWIS: Sure.

8 MS. DeCRISTOFARO: Your Honor, objection. That he
9 can't testify from personal knowledge what happened to people.
10 He can say what was alleged in a different case.

11 THE COURT: That's sustained, too, but --

12 MR. LEWIS: That's the difficulty with these
13 exhibits, Your Honor. They talk about the nature of exposure
14 right on them.

15 MR. BERNICK: We'll stipulate that they all come from
16 a CMS database which is based upon allegations that are made in
17 various complaints, in other pleadings, in materials submitted
18 in connection with cases. They don't represent the witness'
19 personal knowledge.

20 THE COURT: I don't see an exposure issue on these
21 two pages. I've stricken the account name and the rest of the
22 information is a case ID, a short name, a party ID number, a
23 full name, a disposition date, a disposition type, an account
24 ID, a case status and a case served.

25 MR. LEWIS: But the witness testified -- excuse me.

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1 The witness testified at least as to one person who had an
2 exposure in a non-industrial setting, as I understood his
3 testimony.

4 THE COURT: He said it was from the expanding plant,
5 the office was in the expanding plant.

6 MR. LEWIS: All right. I'll go onto another
7 question.

8 THE COURT: All right.

9 MR. BERNICK: You want the board back?

10 MR. LEWIS: I can see the board.

11 Q Can you see the board with respect to Burlington Northern
12 Sante Fe Railroad's loading location there?

13 A Thank you. Yes, I can.

14 Q Okay. You said that there was an agreement between the
15 Burlington Northern Sante Fe Railroad or its predecessors and
16 Grace concerning indemnification, contractual indemnification
17 for injuries or disease that occurred in that location, at the
18 loading dock, was that your testimony?

19 MR. BERNICK: Objection to the form of the question.

20 THE COURT: I think he's trying to get a
21 clarification. The witness can clarify his testimony.

22 THE WITNESS: Well, there was an agreement between
23 Burlington Northern or its predecessor, the Zonolite Company
24 and then later Grace, concerning the -- governing Grace's
25 operation of the loading dock on the railroad's property or the

Hughes - Cross/Lewis

286

1 railroad's right-of-way. Part of that agreement and it
2 included an agreement that -- whereby Grace or Zonolite, before
3 it, would indemnify and hold harmless the railroad for injuries
4 or personal injury or damages that -- resulting from the
5 operation of the loading facility at the rail site.

6 Q Do you recognize that agreement as referred to, as a
7 siting agreement?

8 A That's one way I've heard them referred to as, yeah.

9 Q Generally, what is a siting agreement?

10 A Again, it's the relationship --

11 MR. PHILLIPS: Objection, no foundation.

12 THE COURT: I'm sorry, I can't hear you.

13 MR. PHILLIPS: Objection, no foundation.

14 Q Do you know what a siting --

15 THE CLERK: Please state your name.

16 MR. PHILLIPS: Robert Phillips.

17 MR. LEWIS: Oh, sorry. Go ahead. Stand up here
18 right by me so you can object, because I know you're going to.

19 MR. PHILLIPS: No foundation.

20 MR. LEWIS: Your Honor, we go a long way back. He's
21 another Montana lawyer.

22 THE COURT: All right. That objection is sustained.

23 Q Do you know what a siting agreement is?

24 A It's an agreement between a company and a railroad
25 concerning the right-of-way, you know, railroad siting onto the

Hughes - Cross/Lewis

287

1 -- either onto their property or on the railroad's
2 right-of-way.

3 Q In this particular siting agreement, or indemnity
4 agreement, was the indemnity limited only to this one siting
5 near the loading facility?

6 MR. LOCKWOOD: Objection. Calls for a legal
7 conclusion, Your Honor. It's asking him to interpret the
8 contract.

9 THE COURT: Does the contract specify, I think the
10 document would speak for itself.

11 MR. LEWIS: Well, I'd like -- may I ask him his
12 understanding of it?

13 THE COURT: Yes.

14 MR. BERNICK: Your Honor, the purpose of and the
15 scope of this witness' testimony on direct examination was
16 simply to characterize the nature and source of the claims,
17 because it bears upon classification. The witness was not
18 tendered to and didn't testify to what the actual scope of the
19 indemnity was, but rather, that the written indemnity was the
20 basis of the claim over by Burlington Northern.

21 MR. LOCKWOOD: And more specifically, Your Honor, the
22 witness was not put up to testify as to whether or not -- what
23 the rights of Grace and BNSF, respectively, were under this
24 agreement. That is not an issue being tendered to the Court.

25 MR. LEWIS: May it please the Court, the difficulty

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1 here is that the chart implies that the agreement that was
2 discussed was limited to that location, it would be -- I would
3 simply want to ask the witness if the siting agreement, or
4 indemnification agreement applied to sitings in the Town of
5 Libby, where there were other Grace facilities and I think it's
6 certainly relevant cross examination.

7 MR. BERNICK: It's no relevance to the classification
8 issue and the source of the relationship between the claim over
9 and the underlying claim, he did not elicit any aspect of that
10 on my examination. I don't know if the witness has even ever
11 seen the documents.

12 THE COURT: Well, why don't we substantiate whether
13 he's seen the documents and see if we get any further than
14 that.

15 Q Well, you've seen siting agreements that existed between
16 Grace and BNSF concerning their impact on personal injury
17 liability cases in Libby, is that true?

18 A I don't know if I've seen the actual agreements. I've
19 seen the letters concerning the indemnification and the
20 insurance in connection with my work. There was correspondence
21 that was -- I've seen that. I'm not sure I've seen the actual
22 agreement.

23 Q This is the question I'm going to ask. Based on your
24 knowledge of the siting agreement, do you know if the siting
25 agreement between Grace and the railroad also applied to other

1 sittings at other locations, in the Libby or Lincoln County
2 area?

3 MR. LOCKWOOD: Objection. Lack of foundation.

4 MR. LEWIS: It's a foundational question.

5 MR. LOCKWOOD: A legal opinion.

6 THE COURT: It's a foundational question, overruled.

7 THE WITNESS: I don't know.

8 MR. LEWIS: No further questions, Your Honor.

9 THE COURT: Mr. Phillips.

10 MR. PHILLIPS: Thank you, Your Honor. May I approach
11 the witness?

12 THE COURT: Yes, sir.

13 MR. PHILLIPS: And may I approach the bench?

14 THE COURT: Please. Thank you.

15 MR. PHILLIPS: Your Honor, and counsel, what you have
16 here is a selection of exhibits that I think would be relevant
17 to all of the testimony that we may have to solicit. The
18 purpose of it, and the list on the front by the way, for
19 everyone, doesn't include everything because I took out a
20 number of the exhibits, that I don't think I need.

21 Your Honor, I believe that I already have agreement
22 from everyone to admit Exhibits 1 through 13 and I move their
23 admission.

24 MR. BERNICK: Your Honor, this, again, I think is
25 going to turn into a document exercise, and a document issue.

1 None of these documents, I believe, are implicated by the
2 substance of this witness' testimony. He didn't opine as to
3 the interpretation of the documents, the application of the
4 documents. He simply characterized the claim.

5 Now, if they, again, want to use this witness as part
6 of their case, to introduce the documents, that then goes --you
7 know, moots the scope issue, but it does then pose a question
8 about whether this is an efficient way to put documents into
9 evidence and I don't know if he has the foundation to be able
10 to do it.

11 THE COURT: Well, I have --

12 MR. BERNICK: We've undertaken to look at all these
13 documents and to deal with these issues and to go through two
14 notebooks worth of documents and go through one-by-one through
15 the witness on the stand, I don't think is an efficient use of
16 the Court's time.

17 THE COURT: Okay. I only have one notebook and mine
18 starts with Number 7. So, to the extent -- and it doesn't have
19 13 in it, or 12. In fact, it's got seven and eight and then
20 jumps to 14.

21 MR. PHILLIPS: Right. I only need seven and eight
22 right now, but I'd be happy to bring the other ones in, in the
23 morning, Your Honor. I just didn't make copies of all of
24 those, sorry.

25 THE COURT: All right. I thought, though, counsel

1 said that there was a stipulation that Exhibits 1 through 13
2 were admissible. So, if that's the case and he wants to move
3 their admission now, what's the objection?

4 MR. LOCKWOOD: Can we consult, Your Honor, about
5 this?

6 THE COURT: Yes.

7 MR. BERNICK: This is the same --

8 THE COURT: Well, if they're coming in without
9 evidence, it doesn't matter if it comes in now.

10 MR. BERNICK: That's --

11 MS. ESAYIAN: Your Honor, when we -- Lisa Esayian on
12 behalf of the debtors. When we received and reviewed the
13 exhibits, the first 13 were these contracts that have been
14 referred to between BNSF's predecessors and Grace's
15 predecessors Zonolite, and for the debtors, we said that we
16 would not object because they are contracts, we would not
17 object to their authenticity. We may have reserved a relevance
18 objection, but we said we would not object to their
19 authenticity or hearsay, or anything else, except for relevance
20 objection, depending on what they were offered for.

21 THE COURT: Okay. So, why are they --

22 MR. PHILLIPS: My -- if I may be heard?

23 THE COURT: Yes.

24 MR. PHILLIPS: My recollection of the agreement was
25 that these could be admitted without objection for the purpose

Hughes - Cross/Phillips

292

1 of the confirmation hearing only.

2 MS. ESAYIAN: The debtors don't have a problem with
3 that but I don't know about the other parties.

4 MR. GUY: We have no objection, Your Honor.

5 THE COURT: Mr. Guy, you have no objection?

6 MR. GUY: We're behind the board, we have no
7 objection.

8 THE COURT: All right.

9 MR. LOCKWOOD: The ACC is okay with that, Your Honor.

10 THE COURT: All right. Then Exhibits 1 through 13
11 will be admitted, without the need for any further testimony.

12 MR. PHILLIPS: Thank you, Your Honor.

13 THE COURT: But I need copies.

14 MR. PHILLIPS: I got your message earlier.

15 THE COURT: All right. Let me make a note, please.
16 All right.

17 CROSS EXAMINATION

18 BY MR. PHILLIPS:

19 Q And if I could just draw your attention, Mr. Hughes, to
20 Exhibit Number 7. Have you ever seen that before?

21 A 7A?

22 Q 7, yes 7A. And just to speed it along, I think you'll
23 find that the indemnity clause was actually amended by Exhibit
24 8A.

25 MR. FINCH: Objection. Lack of foundation, to the

Hughes - Cross/Phillips

293

1 extent he's asking him what the document says.

2 THE COURT: I don't think there's a question yet,
3 except is he familiar with it.

4 THE WITNESS: Well, I've seen, again, in connection
5 with this case, I have seen correspondence and some documents
6 related to the agreement between Burlington Northern and its
7 predecessors, and Grace and Zonolite.

8 I don't specifically recall having seen these
9 particular documents and, quite frankly, can't read them.

10 MR. PHILLIPS: They are difficult to read.

11 MR. BERNICK: Apart from that.

12 MR. PHILLIPS: I'll agree to that.

13 (Pause)

14 Q Those copies are the best copies that we have and those
15 are, of course, old historical documents, but those were the
16 best that we can find.

17 Mr. Hughes, in spite of the fact that you've not seen
18 these specific documents, you are aware that historically, the
19 relationship between Great Northern Railway and Zonolite was
20 one whereby Zonolite had some duty to indemnify Great Northern
21 Railway arising out of the operations of the Libby mine,
22 correct?

23 A Yes.

24 Q And, you were also aware that there was an additional
25 requirement that Zonolite acquire insurance for Great Northern

Hughes - Cross/Phillips

294

1 Railway for that same operation?

2 MR. FINCH: Objection. No foundation.

3 MR. BERNICK: Yeah, I would join in that objection
4 because it's a question that -- it's not a background question.

5 THE COURT: It's sustained. It's sustained.

6 MR. BERNICK: Yes.

7 MR. PHILLIPS: I'm sorry, did you sustain the
8 objection?

9 THE COURT: Yes, because the issue is whether it was
10 required to get. This witness testified earlier that he wasn't
11 employed at the time that the insurance would have been
12 obtained, so I don't see that there's a foundation for this.

13 Q Mr. Hughes, do you remember testifying at your deposition
14 that you were aware of the requirement about the acquisition of
15 insurance?

16 MR. BERNICK: That still doesn't give a foundation
17 for it. He has to be competent and there has to be a
18 foundation under 602, to be able to testify. The fact that he
19 may have heard something does not establish that he has
20 sufficient personal knowledge to attest to the fact.

21 THE COURT: Yes. You have to lay the foundation, Mr.
22 Phillips.

23 Q I'll just ask Mr. Hughes -- were you aware that there was
24 a requirement, historically, between Zonolite and W.R. Grace,
25 that Zonolite had the obligation to acquire -- I'm sorry,

1 Zonolite and Great Northern Railway, that there was a
2 requirement that Zonolite acquire insurance for the railway?

3 MR. BERNICK: That's the same question. Maybe there
4 are documents, if there's a contract, then we can see it, but
5 not through this witness.

6 MR. PHILLIPS: Well, we could go back and read seven
7 and eight, but I just asked him if he knows.

8 THE COURT: I think this is a yes or no. Is he aware,
9 so the objection is overruled.

10 THE WITNESS: Yes.

11 Q And that had been in place for a number of years, that
12 requirement?

13 MR. BERNICK: No. The answer is, he's aware.

14 MR. PHILLIPS: Okay.

15 Q And, what is your awareness? What do you know about that?

16 MR. BERNICK: That, again, doesn't pass 602.

17 Q Well, how are you aware?

18 A I'm aware in connection with issues I was involved in, in
19 the last four or five years, concerning insurance and claims by
20 BNSF.

21 Q And, so, was there a requirement then, Mr. Hughes, that
22 Zonolite acquire insurance for the Great Northern Railway?

23 MR. BERNICK: That question asks for this witness' --
24 the conclusion as a lawyer. He's just testified that the basis
25 for his knowledge is information that he obtained during the

1 course of this case and, therefore, you're asking in-house
2 counsel for his mental impressions and attorney work product
3 concerning an ultimate issue with regard to BNSF.

4 THE COURT: That's sustained.

5 MR. PHILLIPS: May I ask him one more question on
6 foundation?

7 THE COURT: Yes.

8 Q Was it your job to know that kind of stuff, Mr. Hughes?

9 A It was part of my job, yes.

10 MR. PHILLIPS: I'll ask the same question, Your
11 Honor, I believe a foundation has been laid.

12 MR. SCHIAVONI: Objection. Your Honor, this happened
13 at a different company, 30 years before this gentleman even
14 joined. There's no foundation for this.

15 THE COURT: There is no foundation for this witness'
16 personal knowledge. He testified that he became aware of this
17 because of the ongoing litigation, and he's also in-house
18 counsel. So to that extent, it is a work product issue.

19 Q You did testify, did you not, Mr. Hughes, that W.R. Grace
20 had assumed the obligations of Zonolite, the liabilities of
21 Zonolite? You're aware of that?

22 A Yes.

23 MR. PHILLIPS: No further questions. Thank you.

24 THE COURT: All right.

25 MR. BERNICK: Where is everybody at that --

Hughes - Cross/Monaco

297

1 THE COURT: Mr. Monaco.

2 CROSS EXAMINATION

3 BY MR. MONACO:

4 Q Good afternoon, Mr. Hughes.

5 A Good afternoon.

6 Q My name is Frank Monaco, I represent the State of Montana.
7 I have a couple of questions for you. You testified on direct
8 about your understanding of the basis of Montana's claims for
9 contribution indemnification.

10 A Yes.

11 Q And I'd like to ask you a few follow up questions on that.
12 You're aware that those claims are based on 148 lawsuits
13 brought by the Libby claimants in the State of Montana against
14 the State of Montana?15 A I didn't know the specific number, but I knew there were
16 several, yes.17 Q And, are you aware that the State of Montana has filed a
18 proof of claim based on those contribution indemnification
19 claims with the bankruptcy court?20 MR. BERNICK: Ob -- well -- no objection to that
21 question.

22 Q Okay.

23 A Yes.

24 Q Do you have any reason to dispute the fact that the State
25 of Montana has filed a proof of claim?

1 MR. BERNICK: Actually, the prior question, Your
2 Honor, in fairness, was ambiguous. There are 148 claims and
3 the question suggested that the proof of claim covered all of
4 them.

5 THE COURT: No, it doesn't. All he said is he aware
6 that Montana filed a proof of claim. He hasn't asked any
7 specifics, and the answer was yes.

8 MR. BERNICK: Okay.

9 THE COURT: Go ahead, Mr. Monaco.

10 Q Okay. Now, Mr. Hughes are you familiar with the
11 provisions of the plan, as a general matter?

12 A As a general matter.

13 Q Okay. Are you also familiar with the provisions of the
14 TDP?

15 A Again, as a general matter, yes.

16 Q Isn't it correct that Montana's claims for contribution
17 indemnification are being treated as indirect, asbestos
18 personal injury claims under Section 5.6 of the TDP?

19 A Yes.

20 Q And, are you aware that the State of Montana has not paid
21 anything in connection with the 148 lawsuits that were brought
22 against it, either by way of judgment or settlement?

23 A It has not?

24 Q Has not.

25 MR. BERNICK: Just not attorneys fees or anything?

1 MR. MONACO: Pardon?

2 MR. BERNICK: Not attorneys fees or anything?

3 Q I'm talking about to the claimants themselves.

4 A I wasn't aware of that.

5 Q Is it your understanding that the State of Montana cannot
6 assert a claim for contribution indemnification against the TDP
7 unless and until it pays the claims against the Libby
8 claimants?

9 MR. BERNICK: Objection, that calls for, once again,
10 for the witness, now a different witness, to interpret the
11 plan. We did not open that door, I didn't ask him a single
12 question about the plan, as part of an examination of Mr.
13 Hughes as their witness. He is not -- he's not been -- he's
14 not permitted to ask a question about matters that call for the
15 interpretation of the plan, the exercise of legal expertise.
16 So, it calls for an expert opinion outside the scope and I
17 believe Your Honor already addressed this in connection with
18 Phase 1. Interpretation of the plan is not for testimony by a
19 fact witness.

20 THE COURT: Mr. Monaco?

21 MR. MONACO: Well, first of all, Your Honor, I would
22 like to have his understanding of that. Second of all, he was
23 held out as being a witness who was going to testify as to the
24 TDP versus tort standards. And, I think that's a fair
25 questions to ask him.

1 MR. BERNICK: And I didn't have -- that is true, and
2 then because of the concern about opening the door to having
3 him be testifying as an expert, because he'd be comparing it to
4 the TDP, I specifically did not ask him to make a single
5 comparison. I simply asked him what the prepetition practice
6 was. So, we have not elicited any expert testimony, we have
7 not opened the door to any expert testimony.

8 MR. FINCH: And my questions were similarly just
9 based on Grace's prepetition practices, Your Honor.

10 THE COURT: I think this call for a legal conclusion,
11 as to how the claim is going to be treated. At some point, I
12 have to have some testimony as to how these claims are going to
13 be treated, Mr. Monaco. So, I'm not sure when it's coming, but
14 I haven't heard it yet.

15 MR. MONACO: Okay.

16 MR. LOCKWOOD: Your Honor, Mr. Inselbuch testified at
17 length about Section 5.6 --

18 THE COURT: He did.

19 MR. LOCKWOOD: -- and what claims went into it and
20 Mr. Monaco, among others, examined him about that and there's
21 no -- I'm really at a -- and he was involved in the drafting of
22 it. Now you're taking Grace's in-house litigation counsel and
23 asking him to testify on a subject that he said he had a
24 nominal familiarity with.

25 THE COURT: Actually, I'm not taking any witness and

Hughes - Cross/Monaco

301

1 asking any witness to testify about anything, Mr. Lockwood.

2 MR. LOCKWOOD: I'm sorry, Your Honor.

3 THE COURT: Go ahead, and ask your next question.

4 MR. LOCKWOOD: I didn't mean to suggest that you
5 were.

6 MR. MONACO: Your Honor, at Mr. Hughes deposition, my
7 partner Mr. Mangan questioned Mr. Hughes about these very
8 topics, you know, at length.

9 MR. LOCKWOOD: Your Honor, we in the deposition did
10 not limit answering questions to questions that would be
11 admissible at trial. It was a discovery deposition.

12 THE COURT: Yes. I mean discovery isn't necessarily
13 admissible evidence, Mr. Monaco. The concern I have is, this
14 questions seems to go to a legal conclusion, which is what the
15 effect is on Montana and that is outside the scope of what this
16 witness has testified to.

17 MR. MONACO: Fair enough.

18 Q Okay. Mr. Hughes, is it your understanding that the TDP
19 operates on a first in, first out basis?

20 MR. BERNICK: Same objection, Your Honor. Beyond
21 scope. Now he's interpreting the TDP. I'm not sure why it is
22 that Your Honor can rule on something, and then the pages don't
23 get turned and we just go further down the same page.

24 MR. MONACO: Your Honor, I only have a few more
25 questions.

1 MR. BERNICK: Well, it doesn't --

2 THE COURT: Okay. I think it is still asking for a
3 legal conclusion because I don't think, Mr. Monaco, that this
4 witness has testified to anything about the operation of the
5 TDP on that basis. If I'm wrong, somebody should tell me now,
6 because I don't want to foreclose the testimony if there is
7 something in the record about it. But I don't recall it.

8 MR. MONACO: Again, Your Honor, he was held out as
9 someone who is going to testify to these types of issues, we
10 questioned him at his deposition about it, we designated
11 deposition portions of the transcript, and I think it's a
12 little bit unfair now to say that we can't question him about
13 these very topics.

14 MR. BERNICK: But we held out -- we never promised
15 that Mr. Hughes was going to come in to suit the purposes of
16 objectors and testify about anything. We said if he appears,
17 he may testify about these things. And we made the decision
18 precisely because it would open the door, witness what we just
19 saw here today, to a lot of examination of a witness as an
20 expert regarding matters that he hasn't studied in as much
21 detail as Mr. Inselbuch. We didn't do it. We're not required
22 to.

23 THE COURT: Have you identified this witness in your
24 own pretrial statements?

25 MR. MONACO: Your Honor, we basically relied on cross

1 examination of witnesses. I think I'd have to go back and
2 check.

3 THE COURT: And is there an objection to the
4 designations in the transcript that you filed?

5 MR. MONACO: There have been, Your Honor, but they
6 have not been resolved.

7 THE COURT: All right. Tonight, you folks go see if
8 you can resolve it, because otherwise, if this witness has been
9 designated as a person who can address these questions and
10 people rely on that fact and he's here, and we'll get into it,
11 but we'll do it tomorrow, Mr. Monaco, after you go see if you
12 can resolve the objections to the deposition designations.

13 MR. MONACO: Okay. Your Honor, I don't think I have
14 anything further. I guess as housekeeping matter while I'm up
15 here and we were addressing the issues of the 148 complaints,
16 and the proof of claim, I do have a stipulation with the plan
17 proponents to admit them into evidence. There were some
18 objections filed. They've either been resolved or withdrawn.
19 I don't know if this the appropriate time to admit them.

20 THE COURT: To admit what, I'm sorry?

21 MR. MONACO: The 148 complaints that were filed in
22 the State of Montana, plus the proof of claim that was filed by
23 the State of Montana. I would point out with respect to the
24 proof of claim, I think that the debtors designated in the list
25 of exhibits as an amended complaint, that isn't quite accurate.

1 I do have a copy here of the proof of claim, if Your Honor
2 needs it. I think it's the last one. It's 149. But it's not
3 a complaint, it's the proof of claim.

4 THE COURT: Okay. You folks are agreeing that
5 complaints and the proof of claim are admissible?

6 MR. BERNICK: Well, again, this is exactly the same
7 thing happening all over again.

8 THE COURT: Your co-counsel is saying yes, Mr.
9 Bernick. Maybe you'd better consult with them, first.

10 MR. BERNICK: It may well be, but again the practice
11 that's being established here is that we're now being,
12 essentially, held hostage to resolving these different matters
13 that counsel knows we all said were going to be resolved
14 separately. There's a procedure, a written procedure that
15 deals with this. Is the proof of claim something that we would
16 stipulate to, as the fact of the proof of claim, yes. If Mr.
17 Monaco wants to put in all 148 complaints, the answer is, for
18 the purpose of establishing that they've been made, yes, of
19 course.

20 MR. MONACO: Your Honor, I'm not trying to establish
21 the truth of the matter, we don't agree with the allegations in
22 the complaint.

23 THE COURT: Obviously.

24 MR. MONACO: I mean, that's obvious. So --

25 MR. BERNICK: Then what's the purpose --

1 MR. MONACO: -- it's just to show the basis of our
2 contribution indemnification claims.

3 THE COURT: But -- okay. I don't think anybody is --

4 MR. BERNICK: Well, but the basis for the
5 contribution --

6 THE COURT: -- no one is contending that the State of
7 Montana hasn't got -- hasn't alleged that it has an
8 indemnification of contribution claim based on these 148
9 complaints. It seems to me that the proof claim, to the extent
10 you want that in, is fine, I'm not sure what the complaints are
11 going to do for this Court in terms of what the indemnification
12 issue is, I'm not going to be addressing it anyway.

13 MR. BERNICK: Right.

14 THE COURT: So, it's --

15 MR. MONACO: Your Honor, it's just to show that we
16 have claims based on those complaints.

17 THE COURT: Okay. I don't think that's a fact in
18 dispute.

19 MR. MONACO: Okay.

20 THE COURT: Is it a fact in dispute?

21 MR. BERNICK: It's not. I elicited it through Mr.
22 Hughes.

23 THE COURT: Is it a fact in dispute? Yes or no?

24 MR. BERNICK: No, it's not.

25 THE COURT: All right.

1 MR. MONACO: Okay.

2 THE COURT: Then I'll take the proof of claim, I
3 don't need the 148 complaints because it's not disputed.

4 MR. MONACO: Okay, that's fine, Your Honor. As long
5 as that's the stipulation.

6 THE COURT: Do you have the proof of claim marked?

7 MR. MONACO: Your Honor, it was marked as Montana 149
8 and if we're not going to admit the 148 because we're
9 stipulating --

10 MR. BERNICK: I have it right here.

11 MR. MONACO: I have one right here I can get.

12 MR. BERNICK: I have --

13 THE COURT: All right, 149 is fine. I'll take
14 Montana 149 and have it admitted for the purpose of showing
15 that the proof of claim was filed.

16 MR. MONACO: If I could approach, Your Honor.

17 THE COURT: Yes. Okay, thank you.

18 MR. MONACO: I apologize, Your Honor, I didn't know
19 if this was the appropriate time since we were up here talking
20 about it, or at the end of the evidence.

21 THE COURT: It's a little confusing, Mr. Monaco, so
22 it's fine. All right. We are going to recess until nine
23 o'clock tomorrow morning. You're finished, correct, Mr.
24 Monaco?

25 MR. MONACO: Yes, Your Honor.

1 THE COURT: All right. We're going to recess until
2 nine o'clock tomorrow morning. You folks have some work cut
3 out for you tonight, so talk to each other. You're excused
4 until morning.

5 MS. DeCRISTOFARO: Excuse me, Your Honor, one
6 housekeeping -- we all have a number of exhibits which have
7 already been submitted to the Court that we don't plan to
8 question about, that are unobjectionable, do you want us to bring
9 four copies of those?

10 THE COURT: No. I'm not sure where you're telling me
11 they're submitted, on the disks?

12 MS. DeCRISTOFARO: On the disks.

13 THE COURT: Okay. No.

14 MS. DeCRISTOFARO: Do you need one hard copy, is that
15 what you need then?

16 THE COURT: If you're not going to -- if you're not
17 using them with the witness, I don't need any hard copies.
18 Folks, please.

19 If you're not using them with a witness, I don't need
20 any hard copies. I just need the copies to the extent that
21 you're showing them to the witness so that I have a record of
22 what it is because some of these exhibit numbers bear different
23 exhibit stickers, sometimes the parties use duplicate numbers
24 and I want to make sure that if something is shown to the
25 witness, that I have what you show the witness.

1 MS. DeCRISTOFARO: Okay. And so for a proffer that's
2 unobjection, you don't need any hard copies.

3 THE COURT: If the proffer is unobjection to, as long
4 as you can designate for me where those exhibits are, that is,
5 if they're on the CD and how they're marked, that's all I need.

6 MS. DeCRISTOFARO: That's fine, Your Honor. We just
7 wanted -- we were running around thinking we now needed four
8 copies of all our exhibits.

9 THE COURT: No.

10 MS. DeCRISTOFARO: Okay.

11 MR. BERNICK: In terms of tomorrow, Your Honor, we
12 had Mr. Hughes and I know the lady here has been waiting very
13 patiently and Mr. Plevin as is always very, very patient.

14 THE COURT: Gentlemen, I need to leave, please can we
15 --

16 MR. BERNICK: Yes, oh, I'm sorry. Okay. That's
17 fine. We can just talk here about who is going to be next. I
18 don't want to hold Your Honor up.

19 THE COURT: That's fine. If you could put it on the
20 record, go ahead. That's fine.

21 MR. BERNICK: Yes. So, we have Mr. Hughes, and I'm
22 assuming, is there anybody else that needs to cross examine Mr.
23 Hughes?

24 UNIDENTIFIED ATTORNEY: I need five minutes.

25 MR. BERNICK: Okay. So, it sounds like --

1 MS. DeCRISTOFARO: I might have a few questions.

2 MR. BERNICK: Okay. So, it sounds like it's going to
3 be relatively short. After that will be Mr. Shelnitz, who will
4 go through the corporate history with Fresenius and Sealed Air
5 transactions. That's the purpose of his appearance. He'll
6 come back later on lender issues.

7 At that point I don't believe that we have anyone
8 else to call live with respect to insurance, and with respect
9 to indirect claims. Am I wrong about that? So, that, I think
10 is all that we'll be doing on insurance and indirect claims.

11 Dr. Peterson had a situation at home, he'll be here
12 tomorrow and he's to testify on any and all matters that he'll
13 be called upon to testify. They'll be lenders best interests
14 and there may be a couple miscellaneous things. So, we
15 definitely want to get to him. So, after Mr. Shelnitz, I would
16 ask that the Court permit us to put on Dr. Peterson, to
17 complete his examination tomorrow and then we can determine
18 whether there's anybody else who -- well, basically we're then
19 into the insurers and indirect claimants case, because all that
20 we've had is ours. But we don't have any other live witnesses
21 save Mr. Shelnitz, and then Dr. Peterson, whose testimony may
22 bear in part upon that, in connection with this phase of the
23 trial.

24 THE COURT: All right. I don't have any objection
25 calling Dr. Peterson out of turn if that's fine with the

1 parties. We've been doing it to accommodate everyone else, you
2 know. This trial will have to come in in some fashion when
3 everybody puts the pieces together anyway. So, there's no
4 problem with that.

5 So, it's Hughes, Shelnitz, Finke, to the extent that
6 he is recalled, and Peterson tomorrow.

7 MR. BERNICK: That's correct. Well, then there will
8 be other people after that, but that's correct. So, depending
9 upon, though, and we still don't really know, to what extent
10 the objectors are going to call live witnesses as part of their
11 insurance and indirect claims case. That's what would be next.

12 THE COURT: All right. Is that going to happen
13 tomorrow?

14 MR. BERNICK: Yes. There's no reason for it not to.

15 THE COURT: Okay. Mr. Plevin?

16 MR. PLEVIN: Your Honor, I have a witness who arrived
17 here earlier today because we were told we might get through
18 the plan proponents case today. I'd like to have him --

19 THE COURT: Who is it?

20 MR. PLEVIN: Richard Kowalczyk, from Fireman's Fund.

21 THE COURT: All right.

22 MR. PLEVIN: I'd like to have him testify tomorrow so
23 he can be released and go home.

24 MR. BERNICK: Is there anybody else who's going to
25 call somebody live?

1 MR. GIANNOTTI: Your Honor, Dr. Shein, he's an expert
2 for the insurer --

3 THE COURT: I can't hear you.

4 MR. GIANNOTTI: I'm sorry. Professor Shein is an
5 expert that the insurers are calling and he's going to try to
6 get here by tomorrow afternoon. I think he'll be able to, but
7 in an e-mail we got from Ms. Baer last night, she seemed to
8 indicate that it would be okay if he went on Wednesday if he
9 couldn't get here, but I'm going to try to get him here. He
10 has to fly in the morning.

11 THE COURT: I think it's likely that by the time you
12 get through the four debtor witnesses and one from Mr. Plevin,
13 it'll be unlikely to have too much more going on. Does anybody
14 have a witness who is already here or who you expect? Mr.
15 Phillips?

16 MR. PHILLIPS: Your Honor, thank you. And, counsel,
17 I've got two witnesses here that we are trying to work an
18 agreement out with the debtors for a modification that will
19 eliminate their need. But I'm --

20 THE COURT: Who are they?

21 MR. PHILLIPS: I'm sorry, we have Mr. Buren
22 (phonetic) and Ms. McKee (phonetic), both from BNSF.

23 THE COURT: All right.

24 MR. PHILLIPS: Thank you.

25 MR. LOCKWOOD: Your Honor, on the subject of

1 Professor Shein, I think it would be well advised for him to
2 come on Wednesday and what I would like to urge in the interest
3 of, perhaps, saving him the trip, is tomorrow we could argue
4 the motion in limine on him and Professor Priest and then they
5 wouldn't have to come out here and argue the motion and if it
6 were granted, turn around and fly home without testifying.

7 THE COURT: All right. That's fine with me, if you
8 want to do that after the witnesses conclude tomorrow, to see
9 whether that will happen, but folks, I really do have to leave,
10 I'm sorry. I told you yesterday, I told you Friday I needed to
11 be out the door at 5:30. Mr. Brown, you're it. You're the
12 end.

13 MR. BROWN: Your Honor, I just wanted to announce
14 that we are not going to be calling Professor Priest.

15 THE COURT: Okay. Is anyone calling Professor
16 Priest?

17 (No audible response)

18 THE COURT: All right. Then I don't need an argument
19 with respect to Professor Priest.

20 MR. BERNICK: That's very -- we appreciate that,
21 that's very useful to know. So, you should go, I mean, we've
22 got --

23 THE COURT: Yes.

24 MR. BERNICK: -- we may actually get through and get
25 to some other people.

1 THE COURT: Okay, that's fine. All right. We're
2 adjourned, then, until nine o'clock.

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C E R T I F I C A T I O N

We, PATRICIA REPKO, AMY RENTNER, CECILIA ASHBOCK, LORI AULETTA, CARLA OAKLEY & ELAINE HOWELL, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter and to the best of our ability.

/s/ Patricia Repko

PATRICIA REPKO

/s/ Amy Rentner

AMY RENTNER

/s/ Cecilia Ashbock

CECILIA ASHBOCK

/s/ Lori Auletta

LORI AULETTA

/s/ Carla Oakley

CARLA OAKLEY

/s/ Elaine Howell Date: September 17, 2009

ELAINE HOWELL

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